

# INTERNATIONAL HUMANITARIAN LAW

A COMPREHENSIVE INTRODUCTION

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## ABBREVIATIONS

Additional Protocol I (AP I)	Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977
Additional Protocol II (AP II)	Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977
Additional Protocol III (AP III)	Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005
1977 Additional Protocols	Additional Protocols I and II
Amended Protocol II to the Convention on Certain Conventional Weapons	Protocol II to the Convention on Certain Conventional Weapons of 10 October 1980 (Amended Protocol II), as amended on 3 May 1996
Anti-Personnel Mine Ban Convention	Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997
Biological Weapons Convention	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 10 April 1972
Chemical Weapons Convention	Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 13 January 1993
CIHL	Customary international humanitarian law
Cluster Munitions Convention	Convention on Cluster Munitions, 30 May 2008
Common Article 1	Article 1 common to the Geneva Conventions of 12 August 1949
Common Article 2	Article 2 common to the Geneva Conventions of 12 August 1949
Common Article 3	Article 3 common to the Geneva Conventions of 12 August 1949
Convention against Torture	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984
Convention on Certain Conventional Weapons	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980
ECHR	European Court of Human Rights
ENMOD Convention	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 10 December 1976



1949 Geneva Conventions (GC I, II, III and IV)	Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (First Geneva Convention) Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 (Second Geneva Convention) Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949 (Third Geneva Convention) Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (Fourth Geneva Convention)
Geneva Gas Protocol	Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925
Hague Convention No. V	Convention No. V respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, The Hague, 18 October 1907
Hague Convention No. XIII	Convention No. XIII concerning the Rights and Duties of Neutral Powers in Naval War, The Hague, 18 October 1907
Hague Convention on Cultural Property	Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954
1899 Hague Declaration concerning Asphyxiating Gases	Declaration (IV,2) concerning Asphyxiating Gases, The Hague, 29 July 1899
1899 Hague Declaration concerning Expanding Bullets	Declaration (IV,3) concerning Expanding Bullets, The Hague, 29 July 1899
Hague Regulations	Convention No. IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907
IACHR	Inter-American Commission on Human Rights
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice annexed to the Charter of the United Nations, 26 June 1945
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
International Federation	International Federation of Red Cross and Red Crescent Societies
IHL	International humanitarian law
IRRC	<i>International Review of the Red Cross</i>
Movement	International Red Cross and Red Crescent Movement
National Societies	National Red Cross or Red Crescent Societies

NATO	North Atlantic Treaty Organization
Protocol I to the Convention on Certain Conventional Weapons	Protocol I to the Convention on Certain Conventional Weapons of 10 October 1980, on Non-Detectable Fragments (Protocol I), 10 October 1980
Protocol II to the Convention on Certain Conventional Weapons	Protocol II to the Convention on Certain Conventional Weapons of 10 October 1980, on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), 10 October 1980
Protocol III to the Convention on Certain Conventional Weapons	Protocol III to the Convention on Certain Conventional Weapons of 10 October 1980, on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), 10 October 1980
Rome Statute	Rome Statute of the International Criminal Court, 17 July 1998
St Petersburg Declaration	Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, 29 November / 11 December 1868
Study on customary IHL	ICRC study on customary international humanitarian law
UN	United Nations
UN Charter	Charter of the United Nations, San Francisco, 26 June 1945

## FOREWORD

In the modern world, rapid developments in science and technology, and polarized power relations, may call into question the law's ability to adapt itself to regulate human conduct, especially in the most dramatic circumstances of war. However, even in this era of global change and scientific progress, the fundamental idea behind the rules and principles of international humanitarian law (IHL) – that even wars have limits – is not one we seek to challenge. While we must turn to the past to understand their importance, we must also consider the future to make sure IHL rules and principles will continue to provide the best possible protection to persons affected by armed conflicts. Combining 150 years of humanitarian action in the field and a universal mandate to work for the implementation and development of IHL, the International Committee of the Red Cross (ICRC) remains committed to pursuing this aim. In light of this institutional commitment, how does the publication of this new textbook, *International Humanitarian Law: A Comprehensive Introduction*, offer a response to contemporary challenges in warfare? What is the added value of this textbook for readers and for the ICRC?

*International Humanitarian Law: A Comprehensive Introduction* aims to promote and strengthen knowledge of IHL among academics, the judiciary, weapon-bearers, the staff of humanitarian non-governmental organizations and international organizations, and media. This textbook presents contemporary issues related to IHL in an accessible and comprehensive manner, in line with the ICRC's reading of the law. Thanks to its particular format and style, this book is not exclusively intended for lawyers; it also aims to meet the needs of persons approaching IHL for the first time and interested in conflict-related matters. Our hope is that a better understanding of the way IHL applies and regulates contemporary armed conflicts can help enhance protection for the lives and dignity of people affected by violence.

In today's world, IHL is being debated and challenged on many levels. At the factual level, the features of contemporary armed conflicts present a challenge. These features include: an increase in asymmetric conflicts, the involvement of one or more third States' armed forces in local conflicts crossing national borders, and the proliferation and fragmentation of armed parties. These factors have appeared at times to challenge the faithful application of IHL. Moreover, in the aftermath of 11 September 2001, both the multiplication of terror attacks deliberately targeting civilians, and overly permissive or restrictive interpretations of IHL to achieve policy objectives, have tended to undermine the very object and purpose of IHL.

A further challenge lies in the growing complexity of the interplay between IHL and other bodies of law, such as human rights law or international criminal law, which, despite all similarities, are built on different rationales. The lack of clarity deriving from the overlap between those bodies of law, combined with the resulting jurisprudential and doctrinal interpretations, has at times been used as a pretext to lower the level of legal protection during armed conflict. In the context of the fight against terrorism, for example, we have seen references being made to IHL in order to lower the threshold for the use of force, and derogations under human rights law used as an argument to lower the protection afforded to detainees. A further consequence of these developments has been the increased sophistication of legal interpretations moving the law too far away from the reality on the ground.

In parallel, new technologies have entered the modern battlefield, giving rise to new questions that urgently need practical answers. While there can be no doubt that IHL applies to new weapons and more generally to the use of new technologies in warfare, new means and methods pose new legal and practical questions. Cyberspace has potentially opened up an altogether different theatre of war that needs to be explored. The growing reliance on remote-controlled weapon systems, such as drones, raises issues regarding, *inter alia*, the geographical scope of the battlefield, the applicable legal framework and accountability. Automated weapons, along with the above-mentioned legal concerns, raise additional ethical questions that deserve attention.

All of these challenges and other contemporary issues are addressed in this textbook, in an attempt to take stock of and provide answers to recent developments involving both facts and legal interpretations. In that regard, *International Humanitarian Law: A Comprehensive Introduction* has greatly benefited from Dr Nils Melzer's combination of field experience and legal expertise as a former ICRC delegate and legal adviser. I would like here to express my deep gratitude to him for having associated his rich experience with his expert knowledge of the law to give this textbook its unique flavour, and to my ICRC colleagues for coming along so enthusiastically on the journey.

IHL, as a branch of law, cannot remain disconnected from the realities to which it is meant to apply, as it aims "simply" to limit the consequences of war; and its capacity to adapt to new circumstances and challenges should never be underestimated.

I sincerely hope that *International Humanitarian Law: A Comprehensive Introduction* can make the law and the ICRC's legal and operational perspectives more accessible to the reader, provide a useful starting point to delve in greater depth into particular topics, and prompt concrete action to improve the protection of victims of armed conflicts.

*Dr Helen Durham*

*Director*

*International Law and Policy*

*International Committee of the Red Cross*

## INTRODUCTION

From the dawn of history to the present day, the scourge of war has brought unspeakable horror, suffering and destruction to millions of people, combatants and civilians alike. Entire generations have been maimed and traumatized by violence, loss, deprivation and abuse. Families have been torn apart and dispersed, livelihoods destroyed and the hopes of countless men, women and children shattered. While war may have been idealized in heroic tales of liberation, revolution and conquest, no one who has actually experienced the reality of armed conflict can escape being deeply shaken, tormented and destabilized – for as much as war is exclusively human, it is also inherently inhumane. It was the appalling agony and desperation of the victims of war that gave birth to international humanitarian law (IHL), a body of law conceived on the battlefields of the past and present to alleviate human suffering in situations of armed conflict. Today, the 1949 Geneva Conventions are the most widely ratified treaties on the planet, a fact that speaks not only to the practical relevance of IHL, but also to the universal authority of the humanitarian principles it promotes.

This book offers a comprehensive introduction to IHL. It provides military and humanitarian personnel, policymakers and academics with a basic but complete understanding of the rationale and specific characteristics of IHL, and of its place and function within the landscape of contemporary international law. In dealing with the various issues, this book does not engage in overly technical discussions or heavily footnoted research, nor does it purport to systematically reflect all academic views on the matter. Rather, each of its eight chapters endeavours to cover a particular topic from the ICRC's perspective while remaining accessible in terms of style and substantive depth. Individual chapters can be consulted separately, by topic, or in conjunction with others. They can be used to acquire basic knowledge, to design courses, training tools and individual lectures, or simply for quick reference thanks to the “In a nutshell” sections summarizing the content at the outset of each chapter.

As a general rule, footnote references are restricted to direct legal sources and selected key ICRC reference documents. In terms of legal sources, systematic reference is made not only to treaty law, but also to the ICRC study on customary IHL. Where appropriate, “To go further” sections at the end of a passage or chapter guide the reader towards more specialized or detailed literature, to related e-learning tools and, in particular, to relevant documents and cases discussed in the ICRC's reference work *How Does Law Protect in War?* Moreover, thematic “Textboxes” focusing on specific law and policy initiatives link the substantive discussion of a particular topic

to the latest practical developments in that area of the law. Thanks to this approach, the book covers the subject matter of IHL comprehensively but remains comparatively short, straightforward and to the point.

In terms of substance, the book takes only a cursory look at the historical development of IHL and instead focuses on outlining the current state of the law and the legal and practical challenges arising from contemporary situations of armed conflict. After two introductory chapters presenting the basic characteristics of IHL, its interrelation with other legal frameworks (Chapter 1) and its temporal, personal and geographical scope of application (Chapter 2), four substantive chapters discuss IHL governing the conduct of hostilities (Chapter 3) and the protection of the main categories of person affected by armed conflicts, namely the wounded and sick and the medical mission (Chapter 4), those deprived of their liberty (Chapter 5), and civilians in territory controlled by the enemy (Chapter 6). The book concludes with a chapter on the implementation and enforcement of IHL (Chapter 7) and another on the special role of the ICRC in this respect (Chapter 8).

A special challenge for any introduction to IHL is to properly present and compare the distinct legal regimes governing international and non-international armed conflicts. While there are fundamental legal and factual differences that must be taken into account, there is also a growing substantive convergence between these two bodies of law that cannot be ignored. For the purposes of this book, it was deemed best to begin each chapter with a thorough discussion of IHL governing international armed conflicts and to conclude with a complementary section highlighting the specific legal and humanitarian issues characterizing non-international armed conflicts. Numerous footnote references to customary IHL in both parts illustrate how most of the substantive rules prove to be identical in both types of conflict. Read in conjunction, the various sections and chapters offer a broad but consolidated understanding of IHL as it applies to the realities of modern-day armed conflicts.

Ultimately, this book aims to become a useful everyday companion for military and humanitarian personnel, policymakers, academics and students worldwide. It is our hope that, in achieving this ambitious goal, it will help to enhance understanding and implementation of IHL and, thereby, contribute to protecting the dignity of those most exposed to the dangers of conflict – for the benefit of humanity as a whole.

*Dr Nils Melzer*

*Human Rights Chair*

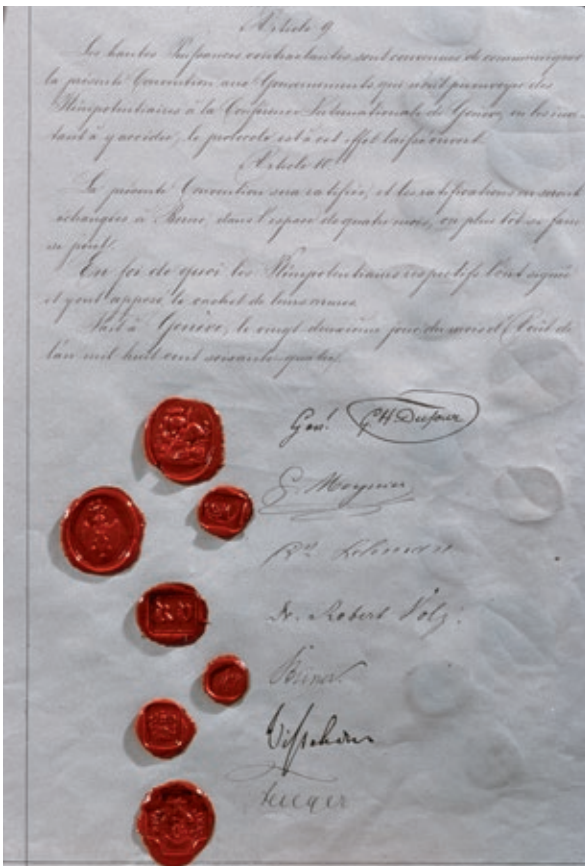
*Geneva Academy of International Humanitarian Law and Human Rights*





# Chapter 1

## Introduction to IHL



ICRC

Next-to-last page of the Geneva Convention of 22 August 1864.

## Structure

- I. Definition and core principles of IHL
- II. Sources of IHL
- III. IHL in the international legal order
- IV. A brief history of and contemporary challenges for IHL

### **In a nutshell**

- The purpose of IHL is to protect the victims of armed conflicts and regulate hostilities based on a balance between military necessity and humanity.
- IHL must be distinguished from legal frameworks that may apply in parallel but which have different objects and purposes, such as the UN Charter, the law of neutrality, human rights law and international criminal law.
- The belligerents must meet their humanitarian obligations in all circumstances, regardless of the enemy's conduct and of the nature or origin of the conflict.
- Although IHL is today one of the most densely codified and ratified branches of international law, its rules can also be derived from custom and general principles of law.
- Recent political, social, economic and technological developments pose fresh challenges to the fundamental achievements and faithful implementation of IHL.

## I. DEFINITION AND CORE PRINCIPLES OF IHL

### 1. Definition of IHL

IHL is a set of rules that seek to limit the humanitarian consequences of armed conflicts. It is sometimes also referred to as the law of armed conflict or the law of war (*jus in bello*). The primary purpose of IHL is to restrict the means and methods of warfare that parties to a conflict may employ and to ensure the protection and humane treatment of persons who are not, or no longer, taking a direct part in the hostilities. In short, IHL comprises those rules of international law which establish minimum standards of humanity that must be respected in any situation of armed conflict.

→ On the distinction between the concepts of “war” and “armed conflict,” see Chapter 2.III.3.

### 2. Equality of belligerents and non-reciprocity

IHL is specifically designed to apply in situations of armed conflict. The belligerents therefore cannot justify failure to respect IHL by invoking the harsh nature of armed conflict; they must comply with their humanitarian obligations *in all circumstances*.<sup>1</sup> This also means that IHL is equally binding on all parties to an armed conflict, irrespective of their motivations or of the nature or origin of the conflict.<sup>2</sup> A State exercising its right to self-defence or rightfully trying to restore law and order within its territory must be as careful to comply with IHL as an aggressor State or a non-State armed group having resorted to force in violation of international or national law, respectively (*equality of belligerents*). Moreover, the belligerents must respect IHL even if it is violated by their adversary (*non-reciprocity of humanitarian obligations*).<sup>3</sup> Belligerent reprisals are permitted only under extremely strict conditions and may never be directed against persons or objects entitled to humanitarian protection.

→ On belligerent reprisals, see Chapter 7.VII.5.

### 3. Balancing military necessity and humanity

IHL is based on a balance between considerations of military necessity and of humanity. On the one hand, it recognizes that, in order to overcome an adversary in wartime, it may be militarily necessary to cause death, injury and destruction, and to impose more severe security measures than would

1 GC I–IV, common Art. 1; CIHL, Rule 139.

2 AP I, Preamble, para. 5.

3 GC I–IV, common Art. 1; CIHL, Rule 140.

be permissible in peacetime. On the other hand, IHL also makes clear that military necessity does not give the belligerents *carte blanche* to wage unrestricted war.<sup>4</sup> Rather, considerations of humanity impose certain limits on the means and methods of warfare, and require that those who have fallen into enemy hands be treated humanely at all times.<sup>5</sup> The balance between military necessity and humanity finds more specific expression in a number of core principles briefly outlined below.<sup>6</sup>

#### 4. Distinction

The cornerstone of IHL is the principle of distinction. It is based on the recognition that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy,”<sup>7</sup> whereas “[t]he civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.”<sup>8</sup> Therefore, the parties to an armed conflict must “at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”<sup>9</sup>

→ On the principle of distinction, see Chapter 3.

#### 5. Precaution

The principle of distinction also entails a duty to avoid or, in any event, minimize the infliction of incidental death, injury and destruction on persons and objects protected against direct attack. Accordingly, IHL requires that, “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.”<sup>10</sup> This applies both to the attacking party, which must do everything feasible to avoid inflicting incidental harm as a result of its operations (*precautions in attack*),<sup>11</sup> and to the party being attacked, which, to the maximum extent feasible, must take all necessary measures to protect the civilian

4 AP I, Art. 35(1); Hague Regulations, Art. 22. For further information, see Françoise Hampson, “Military necessity,” in “Crimes of War,” webpage, 2011. Available at: <http://www.crimesofwar.org/a-z-guide/military-necessity/>

5 See Chapter 1, II.3, which discusses “elementary considerations of humanity” as a general principle of law. For further information, see also Robin Coupland, “[Humanity: What is it and how does it influence international law?](#),” *IRRC*, Vol. 83, No. 844, December 2001, pp. 969–990.

6 See also Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols*, op. cit. (note 186), paras 1389–1397.

7 St. Petersburg Declaration, Preamble.

8 AP I, Art. 51(1); CIHL, Rule 1.

9 AP I, Art. 48; CIHL, Rules 1 and 7.

10 AP I, Art. 57(1); CIHL, Rule 15.

11 *Ibid.*

population under its control from the effects of attacks carried out by the enemy (*precautions against the effects of attack*).<sup>12</sup>

→ On the principle of precaution, see Chapter 3.III.2–4.

## 6. Proportionality

Where the infliction of incidental harm on civilians or civilian objects cannot be avoided, it is subject to the principle of proportionality. Accordingly, those who plan or decide on an attack must refrain from launching, or must suspend, “any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>13</sup>

→ On the principle of proportionality, see Chapter 3.III.1.

## 7. Unnecessary suffering

IHL not only protects civilians from the effects of hostilities, it also prohibits or restricts means and methods of warfare that are considered to inflict unnecessary suffering or superfluous injury on combatants. As early as 1868, the St Petersburg Declaration recognized:

“That the only legitimate object [...] during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity.”

Accordingly, in the conduct of hostilities, it is prohibited “to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”<sup>14</sup>

12 AP I, Art. 58; CIHL, Rule 22.

13 AP I, Arts 51(5)(b) and 57(2)(a)(iii) and (b); CIHL, Rules 14, 18 and 19.

14 AP I, Art. 35(2); Hague Regulations, 23(e); CIHL, Rule 70.

→ On the prohibition of unnecessary suffering, see Chapter 3.V.1.

## 8. Humane treatment

One of the most fundamental rules of IHL is that all persons who have fallen into the power of the enemy are entitled to humane treatment regardless of their status and previous function or activities. Accordingly, common Article 3, which is considered to reflect a customary “minimum yardstick” for protection that is binding in any armed conflict, states: “Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.”<sup>15</sup> Although IHL expressly permits parties to the conflict to “take such measures of control and security in regard to [persons under their control] as may be necessary as a result of the war,”<sup>16</sup> the entitlement to humane treatment is absolute and applies not only to persons deprived of their liberty but also, more generally, to the inhabitants of territories under enemy control.

→ On the duty of humane treatment, see Chapters 4–6.

### To go further (Definition and core principles of IHL)<sup>17</sup>

- *Rules of war (in a nutshell)*, film, ICRC, 2014. Available at: <https://www.icrc.org/eng/resources/documents/audiovisuals/video/2014/rules-of-war.htm>
- ICRC e-learning module, *What is international humanitarian law?* Available at: <http://www.icrcproject.org/elearning/en/ihl/M1/index.html>
- Jean Pictet, *Development and Principles of International Humanitarian Law*, Nijhoff Law Specials No. 2, Martinus Nijhoff Publishers, Dordrecht, 1985.

<sup>15</sup> GC I–IV, common Art. 3(1); CIHL, Rules 87 and 88.

<sup>16</sup> GC IV, Art. 27(4).

<sup>17</sup> All ICRC films, databases, documents and reports, readings and case studies from M. Sassòli, A. Bouvier and A. Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, and articles from the *IRRC*, are available on the ICRC website: [www.icrc.org](http://www.icrc.org)  
All hyperlinks mentioned in this textbook were last visited on 28 January 2016.

## II. SOURCES OF IHL

Just like any other body of international law, IHL can be found in three distinct sources: treaties, custom, and the general principles of law.<sup>18</sup> In addition, case-law, doctrine and, in practice, “soft law” play an increasingly important role in the interpretation of individual rules of IHL.

### 1. Treaty law

Today, IHL is one of the most densely codified branches of international law. In practice, therefore, the most relevant sources of IHL are treaties applicable to the armed conflict in question. For example, in situations of international armed conflict, the most important sources of applicable IHL would be the four 1949 Geneva Conventions, their Additional Protocol I, and weapons treaties, such as the 1980 Convention on Certain Conventional Weapons or the 2008 Convention on Cluster Munitions. Treaty IHL applicable in non-international armed conflicts is significantly less developed, the most important sources being common Article 3 and, in certain circumstances, Additional Protocol II.<sup>19</sup> Given that most contemporary armed conflicts are non-international, there is a growing perception that certain areas of treaty IHL governing these situations may require further strengthening, development or clarification.

→ See also Textbox 9: *Swiss/ICRC initiative on strengthening the implementation of IHL* (Chapter 7.III.4.b.).

The advantage of treaty IHL is that it is relatively unambiguous. The scope of applicability of the treaty is defined in the text itself, the respective rights and obligations are spelled out in carefully negotiated provisions, which may be supplemented with express reservations or understandings, and the States Parties are clearly identified through the act of ratification or accession. This does not preclude questions of interpretation from arising later, particularly as the political and military environment changes over time, but it provides a reliable basis for determining the rights and obligations of belligerents and for engaging in dialogue with them on their compliance with IHL.

### 2. Custom

While treaty law is the most tangible source of IHL, its rules and principles are often rooted in custom, namely general State practice (*usus*) accepted

18 ICJ Statute, Art. 38(1).

19 Other applicable treaties include the 1998 Rome Statute, the 1954 Hague Convention on Cultural Property and its Second Protocol of 1999, and a number of specific weapons treaties, namely the Convention on Certain Conventional Weapons of 10 October 1980 and as amended on 21 December 2001, the 1997 Anti-Personnel Mine Ban Convention, the 1993 Chemical Weapons Convention, and the 2008 Convention on Cluster Munitions.

as law (*opinio juris*).<sup>20</sup> Such practice has consolidated into customary law, which exists alongside treaty law and independently of it. Customary law does not necessarily predate treaty law; it may also develop after the conclusion of a treaty or crystallize at the moment of its conclusion. For example, a belligerent State may have ratified neither the 1980 Convention on Certain Conventional Weapons nor Additional Protocol I, which prohibits the use of “weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.” There is, however, a universally recognized customary prohibition against such means and methods of warfare.<sup>21</sup> Thus, that State would be prohibited from using such munitions under customary IHL.

The advantage of customary IHL is that it is a dynamic body of law constantly evolving in tandem with State practice and legal opinion. Customary law can therefore adapt much more quickly to new challenges and developments than treaty law, any change or development of which requires international negotiations followed by the formal adoption and ratification of an agreed text. Also, while treaties apply only to those States that have ratified them, customary IHL is binding on all parties to an armed conflict irrespective of their treaty obligations. Customary law is relevant not only where an existing IHL treaty has not been ratified by a State party to an international armed conflict; it is particularly relevant in situations of non-international armed conflict, because these are regulated by far fewer treaty rules than international armed conflicts, as explained above. The disadvantage of customary law is that it is not based on a written agreement and, consequently, that it is not easy to determine to what extent a particular rule has attained customary status. In reality, State practice tends to be examined and customs identified by national and international courts and tribunals tasked with the interpretation and adjudication of international law. The ICRC’s extensive study on customary IHL is also a widely recognized source of reference in this respect (see Textbox 1, Chapter 1.II.2 below).

The fact that customary law is not written does not mean that it is less binding than treaty law. The difference lies in the nature of the source, not in the binding force of the resulting obligations. For example, the International Military Tribunal at Nuremberg, in the trials following World War II, held not only that the 1907 Hague Regulations themselves had attained customary nature and were binding on all States irrespective of ratification and reciprocity, but also that individuals could be held criminally responsible and punished for violating their provisions as a matter of customary

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20 ICJ Statute, Art. 38(1)(b).

21 CIHL, Rule 70.



international law. Similarly, the ICTY has based many of its judgments on rules and principles of IHL not spelled out in the treaty law applicable to the case at hand but considered to be binding as a matter of customary law.

### **Textbox 1: The ICRC study on customary international humanitarian law**

In December 1995, the 26th International Conference of the Red Cross and Red Crescent formally mandated the ICRC to prepare a report on customary rules of IHL applicable in international and non-international armed conflicts.<sup>22</sup> In 2005, after extensive research and consultations with experts throughout the world, the ICRC published its report, now referred to as “the study on customary IHL.”<sup>23</sup> In essence, the study provides a snapshot of what the ICRC considered to be customary IHL at the time of publication. As such, it is not binding on any party to an armed conflict, but carries the authority of an organization specifically mandated by the international community “to work for the understanding and dissemination of knowledge of international humanitarian law.”

The study does not attempt to examine each rule of treaty IHL as to its customary nature; rather, it aims to establish whether and, if so, to what extent certain issues of practical relevance are regulated in customary IHL. Volume I of the study lists 161 rules that the ICRC considers to be binding as a matter of customary IHL and explains the rationale behind that assessment; Volume II catalogues the practice on which the conclusions in Volume I are based. The study shows that certain rules and principles of treaty IHL have attained customary status or have greatly influenced the formation of customary law. The study also indicates that 143 rules of treaty law applicable in international armed conflicts have also become binding in non-international armed conflicts as a matter of customary IHL, and that only 13 rules are applicable in non-international armed conflicts alone.<sup>24</sup> Finally, the study discusses areas where IHL is not clear and points to issues that require further clarification. Overall, the ICRC’s study on customary IHL should not be seen as the end but as the beginning of a process aimed at improving understanding of, and securing broader agreement on, the rules and principles of IHL.

- For a list of the rules identified as being customary by the ICRC, see the online *ICRC customary IHL database*, available at: <http://www.icrc.org/customary-ihl/eng/docs/home>

22 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Resolution 1, “[International humanitarian law: From law to action; Report on the follow-up to the International Conference for the Protection of War Victims](#),” *IRRC*, No. 311, 1996, p. 58.

23 J.-M. Henckaerts and L. Doswald-Beck, [Customary International Humanitarian Law, Vol. I: Rules and Vol. II: Practice](#), Cambridge University Press, Cambridge, 2005.

24 *Ibid.*

### 3. General principles of law

The third source of international law, next to treaties and custom, consists of “the general principles of law recognized by civilized nations.”<sup>25</sup> There is no agreed definition or list of general principles of law. In essence, the term refers to legal principles that are recognized in all developed national legal systems, such as the duty to act in good faith, the right of self-preservation and the non-retroactivity of criminal law. General principles of law are difficult to identify with sufficient accuracy and therefore do not play a prominent role in the implementation of IHL. Once authoritatively identified, however, general principles of law can be of decisive importance because they give rise to independent international obligations.

Most notably, the ICJ has on several occasions derived IHL obligations directly from a general principle of law, namely “elementary considerations of humanity,” which it held to be “even more exacting in peace than in war.” Based on this principle, the ICJ has argued that the IHL obligation of States to give notice of maritime minefields in wartime applies in peacetime as well,<sup>26</sup> and that the humanitarian principles expressed in common Article 3 are binding in any armed conflict, irrespective of its legal classification and of the treaty obligations of the parties to the conflict.<sup>27</sup> Moreover, the ICTY has argued that “elementary considerations of humanity” are “illustrative of a general principle of international law” and “should be fully used when interpreting and applying loose international rules” of treaty law.<sup>28</sup>

In this context, it would be remiss not to refer to the Martens Clause, which provides that, in cases not regulated by treaty law, “populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.”<sup>29</sup> The Martens Clause was first adopted at the First Hague Peace Conference of 1899 and has since been reformulated and incorporated in numerous international instruments.<sup>30</sup> While the extent to which specific

25 ICJ Statute, Art. 38.

26 ICJ, *Corfu Channel Case (United Kingdom v. Albania)*, Judgment (Merits), 9 April 1949, *ICJ Reports 1949*, p. 22.

27 ICJ, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Nicaragua case)*, Judgment (Merits), 27 June 1986, para. 218.

28 ICTY, *The Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-T-14, Judgment (Trial Chamber), January 2000, para. 524.

29 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 29 July 1899 (Hague Convention No. II), Preamble.

30 Hague Regulations, Preamble; GC I, Art. 63; GC II, Art. 62; GC III, Art. 142; GC IV, Art. 158; AP I, Art. 1(2); AP II, Preamble; Convention on Certain Conventional Weapons, Preamble.

legal obligations can be derived directly from the Martens Clause remains a matter of controversy, the Clause certainly disproves assumptions suggesting that anything not expressly prohibited by IHL must necessarily be permitted.

#### 4. The role of “soft law,” case-law and doctrine

While treaties, custom and general principles of law are the only sources of international law, the rules and principles derived from these sources often require more detailed interpretation before they can be applied in practice.<sup>31</sup> For example, while the law makes clear that IHL applies only in situations of “armed conflict,” the precise meaning of that term must be determined through legal interpretation. Similarly, IHL provides that civilians are entitled to protection from direct attack “unless and for such time as they take a direct part in hostilities.” Again, a decision as to whether a particular civilian has lost his or her protection depends on the meaning of the term “direct participation in hostilities.”

Of course, guidance on the interpretation of IHL can be given by the States themselves as the legislators of international law. This may take the form of unilateral reservations or declarations, or resolutions of multilateral organizations, but also of support for non-binding instruments. Examples of such “soft law” instruments relevant for the interpretation of IHL include the United Nations Guiding Principles on Internal Displacement (1998) and the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005).<sup>32</sup>

Absent such State-driven guidance, the task of interpreting IHL falls, first and foremost, to international courts and tribunals mandated to adjudicate cases governed by IHL, such as the ad hoc international criminal tribunals established for specific conflicts, the International Criminal Court and, of course, the ICJ. In addition, the teachings of the most highly qualified publicists are also recognized as a subsidiary means of determining the law.<sup>33</sup> Also, in view of the special mandate of the ICRC, its *Commentaries* on the

31 For the general rule for treaty interpretation, see Vienna Convention on the Law of Treaties, 23 May 1969, (Vienna Convention on the Law of Treaties), Art. 31.

32 For an overview of the ICRC’s contribution to those instruments, see J.-P. Lavoyer, “[Comments on the guiding Principles on Internal Displacement](#),” *IRRC*, No. 324, September 1998; J. Kellenberger, “Relations of the ICRC with the humanitarian system of the UN,” Statement, San Remo, 8 September 2005.

33 ICJ Statute, Art. 38.

1949 Geneva Conventions and their Additional Protocols are regarded as a particularly authoritative interpretation of these treaties.

→ On the special role of the ICRC with regard to IHL, see Chapter 8.

### To go further (Sources of IHL)<sup>34</sup>

- ICRC e-learning module, *What are the sources of international humanitarian law?* Available at: <http://www.icrcproject.org/elearning/en/ihl/M3/index.html>
- For a chronological list of all IHL treaties and their States Parties, see the online ICRC treaty database, available at: <https://www.icrc.org/ihl>
- For a complete list of rules identified by the ICRC as being part of customary IHL, see the online customary IHL database, available at: <https://www.icrc.org/customary-ihl/eng/docs/home>
- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, [Chapter 4: Sources of contemporary international humanitarian law](#), pp. 149–162.
- Jean-Marie Henckaerts, “[Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict](#),” *IRRC*, Vol. 87, No. 857, March 2005, pp. 175–212.

### How Does Law Protect in War?

- Case No. 43, [ICRC, Customary International Humanitarian Law](#)
- Case No. 211, [ICTY, The Prosecutor v. Tadić, paras 94–134](#)
- Case No. 215, [ICTY, The Prosecutor v. Kupreškić et al., paras 525–540](#)

## III. IHL IN THE INTERNATIONAL LEGAL ORDER

IHL is that body of international law which governs situations of armed conflict. As such, it must be distinguished from other bodies of international law, particularly those that may apply at the same time as IHL, but which have a different object and purpose. The most important frameworks to be discussed in this context are: (1) the UN Charter and the prohibition against the use of inter-State force; (2) international human rights law; (3) international criminal law; and (4) the law of neutrality. It should be noted that, depending on the situation, other branches of international law, while not specifically discussed here, may be relevant as well. They include the law of

<sup>34</sup> ICRC documents available at: [www.icrc.org](http://www.icrc.org)

the sea, the law governing diplomatic and consular relations, environmental law and refugee law, to name but a few.

### 1. IHL and the prohibition against the use of inter-State force

IHL governs situations of armed conflict once they arise. It does not regulate whether the use of force by one State against another is lawful in the first place. This function falls to the law governing the use of inter-State force, also referred to as *jus ad bellum* (or, perhaps more accurately, *jus contra bellum*), the basic premises of which are set out in the UN Charter and corresponding customary law. Article 2(4) of the UN Charter provides that States “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” In essence, this amounts to a general prohibition on the use of force, or on the threat thereof, in international relations between States. Although irrelevant under IHL, the question of whether the prohibition against the use of inter-State force has been violated is an important part of the legal and political context of any armed conflict involving cross-border operations on the territory of another State.

The UN Charter stipulates only two exceptions to the prohibition against the use of inter-State force. First, Article 51 states that the prohibition does not impair a State’s “inherent right of individual or collective self-defence if an armed attack occurs.” In essence, this means that a State may lawfully resort to inter-State force in self-defence to the extent that this is necessary and proportionate to repel an armed attack. Second, Article 42 states that the Security Council may use, or authorize the use of, inter-State force “as may be necessary to maintain or restore international peace and security.” It must be emphasized, however, that both exceptions derogate only from the Charter prohibition on the use of inter-State force, but cannot terminate, diminish or otherwise modify the absolute obligation of belligerents to comply with IHL (*equality of belligerents*).<sup>35</sup>

### 2. IHL and human rights law

While IHL regulates the conduct of hostilities and the protection of persons in situations of armed conflict, international human rights law protects the individual from abusive or arbitrary exercise of power by State authorities. While there is considerable overlap between these bodies of law, there are also significant differences.

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35 On the equality of belligerents, see Section I.2.

**Scope of application:** While the personal, material and territorial applicability of IHL essentially depends on the existence of a nexus with an armed conflict, the applicability of human rights protections depends on whether the individual concerned is within the “jurisdiction” of the State involved. For example, during an international armed conflict, IHL applies not only in the territories of the belligerent States, but essentially wherever their armed forces meet, including the territory of third States, international airspace, the high seas, and even cyberspace. According to the prevailing interpretation, human rights law applies only where individuals find themselves within territory controlled by a State, including occupied territories (*territorial jurisdiction*), or where a State exercises effective control, most commonly physical custody, over individuals outside its territorial jurisdiction (*personal jurisdiction*).<sup>36</sup> More extensive interpretations of jurisdiction have been put forward that would extend human rights protections to any individual adversely affected by a State, but they remain controversial.

**Scopes of protection and obligation:** IHL is sometimes inaccurately described as the “human rights law of armed conflicts.” Contrary to human rights law, IHL generally does not provide persons with rights they could enforce through individual complaints procedures. Also, human rights law focuses specifically on human beings, whereas IHL also directly protects, for example, livestock, civilian objects, cultural property, the environment and the political order of occupied territories. Finally, human rights law is binding only on States, whereas IHL is binding on all parties to an armed conflict, including non-State armed groups.

**Derogability:** Most notably, IHL applies only in armed conflicts and is specifically designed for such situations. Therefore, unless expressly foreseen in the relevant treaty provisions, the rules and principles of IHL cannot be derogated from. For example, it would not be permissible to disregard the prohibition on attacks against the civilian population based on arguments such as military necessity, self-defence or distress. Human rights law, on the other hand, applies irrespective of whether there is an armed conflict. In times of public emergency, however, human rights law allows for derogations from protected rights to the extent actually required by the exigencies of the situation. For example, during an armed conflict or a natural disaster, a government may lawfully restrict freedom of movement in order to protect the population in the affected areas

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<sup>36</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (*The Wall Opinion*), 9 July 2004, *ICJ Reports 2004*, para. 109. See also ECHR, *Loizidou v. Turkey* (Preliminary Objections), Case No. 15318/89, Report No. A310, 23 March 1995, paras 62–63; ECHR, *Öcalan v. Turkey*, Case No. 46221/99, Judgment of 12 March 2003 (Chamber), § 93 and ECHR, *Öcalan v. Turkey*, Case No. 46221/99, Judgment of 12 May 2005 (Grand Chamber), § 91.

and to facilitate governmental action aimed at restoring public security and law and order. Only a number of core human rights, such as the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, and the prohibition of slavery remain non-derogable even in times of public emergency.

**Interrelation:** Despite these fundamental differences, IHL and human rights law have rightly been said to share a “common nucleus of non-derogable rights and a common purpose of protecting human life and dignity.”<sup>37</sup> As a general rule, where IHL and human rights law apply simultaneously to the same situation, their respective provisions do not contradict, rather they mutually reinforce each other. Thus, both IHL and human rights law prohibit torture or inhuman and degrading treatment and afford fair-trial guarantees to anyone accused of a crime.

In some areas, the interrelation between IHL and human rights law may be less straightforward. For example, with respect to persons who do not, or no longer, directly participate in hostilities, IHL prohibits violence to life and person, in particular murder in all circumstances. For obvious reasons, however, it does not provide such protection to combatants and civilians directly participating in hostilities. Universal human rights law, on the other hand, protects all persons against “arbitrary” deprivation of life, thus suggesting that the same standards apply to everyone, irrespective of their status under IHL. In such cases, the respective provisions are generally reconciled through the *lex specialis* principle, which states that the law more specifically crafted to address the situation at hand (*lex specialis*) overrides a competing, more general law (*lex generalis*). Accordingly, the ICJ has held that, while the human rights prohibition on arbitrary deprivation of life also applies in hostilities, the test of what constitutes arbitrary deprivation of life in the context of hostilities is determined by IHL, which is the *lex specialis* specifically designed to regulate such situations.<sup>38</sup> Similarly, the question of whether the internment of a civilian or a prisoner of war by a State party to an international armed conflict amounts to arbitrary detention prohibited under human rights law must be determined based on the Third and Fourth Geneva Conventions, which constitute the *lex specialis* specifically designed to regulate internment in such situations.

In other areas, the question of the interrelation between IHL and human rights may be more complicated. For example, while treaty IHL confirms the existence of security internment in non-international armed conflicts

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37 IACHR, *Juan Carlos Abella v. Argentina (La Tablada case)*, Case No. 11.137, Report No. 55/97, 18 November 1997, para. 158. See also ICTY, *Prosecutor v. Anto Furundzija* (Trial Judgment), IT-95-17/1-T, 10 December 1998, para. 183.

38 ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), 8 July 1996, *ICJ Reports 1996*, para. 25.

as well, it does not contain any procedural guarantees for internees, thus raising the question as to how the human rights prohibition of arbitrary detention is to be interpreted in such situations.

Finally, even though, in armed conflicts, IHL and human rights law generally apply in parallel, some issues may also be exclusively governed by one or the other body of law. For example, the fair-trial guarantees of a person who has committed a common bank robbery in an area affected by an armed conflict, but for reasons unrelated to that conflict, will not be governed by IHL but exclusively by human rights law and national criminal procedures. On the other hand, the aerial bombardment of an area outside the territorial control of the attacking State, or any belligerent acts committed by organized armed groups not belonging to a State, will not be governed by human rights law but exclusively by IHL.

## **Textbox 2: ICRC expert meeting on IHL and the use of force in armed conflicts**

### **Scope and practical relevance of the problem**

In a situation of armed conflict, the use of force by armed forces and law enforcement officials is governed by two different paradigms: the conduct of hostilities paradigm, derived from IHL, and the law enforcement paradigm, mainly derived from human rights law. Increasingly, in many contemporary armed conflicts – particularly in occupied territories and in non-international armed conflicts – armed forces are expected to conduct not only combat operations against the adversary but also law enforcement operations in order to maintain or restore public security and law and order. The two paradigms may also coexist in conflicts involving foreign intervention with the agreement of the territorial State (i.e. the State on whose territory the conflict is taking place), or under the mandate of the international community. In practice, it may be difficult to determine which situations are governed by which paradigm. For example, a State engaged in a non-international armed conflict will regard armed opposition fighters not only as legitimate military targets under IHL but also as criminals under domestic law. Thus, the armed forces of that State using force against those fighters may be considered as simultaneously conducting hostilities and maintaining law and order. Difficult situations may also arise when civil unrest coincides with combat operations, or when persons engaged in combat intermingle with civilian rioters or demonstrators. The choice of the applicable paradigm may have significant legal and humanitarian consequences, given that the conduct of hostilities paradigm is generally more permissive than the law enforcement paradigm, most notably in terms of the deliberate use of lethal force and of incidental harm to the civilian population.



### ICRC expert meeting and report

In view of the practical importance of clarifying these questions, the ICRC convened an expert meeting in Geneva on 26 and 27 January 2012 with a view to identifying the dividing line between the conduct of hostilities and law enforcement paradigms in situations of armed conflict. The meeting brought together 22 prominent legal personnel and academics from 16 different countries under the Chatham House Rule, each participating in his or her personal capacity. In November 2013, the ICRC published a report on the issues discussed at the meeting with a few of its concluding observations.

- For further details, see Gloria Gaggioli (ed.), *The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms – Expert Meeting*, Report, ICRC, Geneva, November 2013, 92 pp.
- See also Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms, ICRC webinar recording, November 2014. Available at: <https://www.icrc.org/eng/resources/documents/event/2014/webinar-use-of-force.htm>

### 3. IHL and international criminal law

In regulating the conduct of hostilities and protecting the victims of armed conflict, IHL imposes certain duties on those involved in the conflict and prohibits them from engaging in certain acts. In order to enforce these duties and prohibitions, IHL obliges all parties to a conflict to take the measures necessary to prevent and repress violations of IHL, including criminal prosecution and sanctions. The 1949 Geneva Conventions and Additional Protocol I also identify a series of particularly serious violations, referred to as “grave breaches” and, in Additional Protocol I, as “war crimes,” which give rise to universal jurisdiction. This means that any State, irrespective of its involvement in a conflict or its relation to the suspects or victims in an alleged crime, has an international obligation to conduct an investigation and to either prosecute the suspects or to extradite them to another State willing to prosecute them.<sup>39</sup>

In short, IHL obliges States to prevent and prosecute serious violations of IHL, but it does not attach sanctions to these violations, does not describe them in sufficient detail to make them prosecutable in court, and does not establish any procedures for the exercise of jurisdiction over individual suspects. This is the role of criminal law, whether on the domestic or the international level. In other words, criminal law, in contrast to IHL, does

<sup>39</sup> See also Chapter 7.V.

not define the duties of the belligerents, but creates the legal basis needed to prosecute individuals for serious violations of these duties.

Traditionally, the enforcement of IHL at the level of the individual was largely ensured by the belligerent States themselves, through disciplinary sanctions and criminal prosecution under their national laws and regulations. It was at the end of World War II that serious violations of IHL were first considered to give rise to individual criminal responsibility as a matter of international law and were prosecuted as war crimes by the International Military Tribunals in Nuremberg and Tokyo. These trials remained tied to specific contexts, however, and prosecuted only crimes committed by the defeated parties to the conflict. When the UN Security Council established the ICTY and the ICTR in 1993 and 1994, respectively, their jurisdiction was still confined to particular contexts. It was only with the adoption of the Rome Statute, in 1998, that the international community finally created a permanent International Criminal Court with jurisdiction over international crimes committed by nationals, or on the territory, of a State party to the Statute, or referred to it by the UN Security Council. Today, the Rome Statute has been ratified by more than 120 States; however, a number of militarily important States have yet to do so.

→ On the enforcement of IHL through international criminal law, see Chapter 7.V.–VI.

#### 4. IHL and the law of neutrality

The law of neutrality is traditionally regarded as part of the law of war (*jus in bello*) alongside IHL. It is rooted in customary law and codified in the Hague Conventions, Nos V and XIII, of 1907. In essence, the law of neutrality has three aims: (a) to protect neutral States (i.e. all States that are not party to an international armed conflict) from belligerent action; (b) to ensure neutral States do not militarily support belligerent States; and (c) to maintain normal relations between neutral and belligerent States. Most notably, the law of neutrality obliges neutral States to prevent their territory, including airspace and waters subject to their territorial sovereignty, from being used by belligerent States. If combatants belonging to either party cross into neutral territory, they must be interned by the neutral State; the Third Geneva Convention also requires that they be treated as prisoners of war.<sup>40</sup> The belligerents, in turn, must respect the inviolability of neutral territory and may not move troops or convoys of ammunition or supplies across the territory of a neutral State.

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<sup>40</sup> Hague Regulations, Art. 11; GC III, Art. 4(B)(2).

Strictly speaking, the law of neutrality applies only in international armed conflicts. Over the course of time, however, its rationale has gradually found its way into the practice of non-international armed conflicts as well. For example, with regard to the standards of internment to be applied by neutral States to combatants on their territory, the ICRC has formally stated that Hague Convention No. V “can also be applied by analogy in situations of non-international conflict, in which fighters either from the government side or from armed opposition groups have fled into a neutral State.”<sup>41</sup>

By the same token, in political reality, the consequences of non-State armed groups using the territory of a neutral State to conduct attacks against a belligerent State are similar to those foreseen in the traditional law of neutrality and include, most notably, the loss of the neutral territory’s inviolability. For example, when attacks were launched by al-Qaeda against the United States from within Afghanistan (2001), by Hezbollah against Israel (2006) from within Lebanon, and by the FARC against Colombia from within Ecuador (2008), all the States that had been attacked conducted cross-border incursions against the groups in question, because their neutral host States were unable or unwilling to protect the attacked States’ interests within their territory. The international lawfulness of such cross-border incursions remains widely controversial, particularly in view of the UN Charter’s prohibition on the use of inter-State force. However, the basic obligation of States to prevent non-State armed groups within their territory from engaging in hostile activities against other States is generally recognized.<sup>42</sup>

### To go further (IHL in the international legal order)<sup>43</sup>

- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, [Chapter 2: International humanitarian law as a branch of public international law](#), pp. 117–121.
- Louise Doswald-Beck and Sylvain Vité, “[International Humanitarian Law and Human Rights Law](#),” *IRRC*, No. 293, March–April 1993, pp. 94–119.

41 ICRC, Official Statement to the UNHCR Global Consultations on International Protection, 8–9 March 2001, para. 2.

42 See, for example, the Annex to UN General Assembly Resolution 36/103 of 9 December 1981, Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, paras 2(II)(b) and 2(II)(f).

43 ICRC documents available at: [www.icrc.org](http://www.icrc.org)

- Françoise Hampson and Ibrahim Salama, *The Relationship between Human Rights Law and International Humanitarian Law*, Working Paper submitted to the UN Commission on Human Rights, document E/CN.4/Sub.2/2005/14, 21 June 2005.
- ICRC Advisory Services on International Humanitarian Law, *International Humanitarian Law and International Human Rights Law: Similarities and Differences*. Available at: [http://www.icrc.org/eng/assets/files/other/ihl\\_and\\_ihrl.pdf](http://www.icrc.org/eng/assets/files/other/ihl_and_ihrl.pdf)

### ***How Does Law Protect in War?***

- Case No. 23, [The International Criminal Court](#)
- Case No. 93, [United States Military Tribunal at Nuremberg, The Justice Trial](#)
- Case No. 98, [The Tokyo War Crimes Trial](#)
- Case, ECHR, [Al-Jedda v. UK](#) (only available online)
- Case, ECHR, [Hassan v. UK](#) (only available online)
- Case, [UK, Serdar Mohammed v. Ministry of Defence](#) (only available online)

## **IV. A BRIEF HISTORY OF IHL AND SOME CONTEMPORARY CHALLENGES**

### **1. From ancient battlefields to industrialized war**

War is as old as mankind, and all civilizations and religions have tried to limit its devastating effects by subjecting warriors to customary practices, codes of honour and local or temporary agreements with the adversary. These traditional forms of regulating warfare became largely ineffective with the rise of conscripted mass armies and the industrialized production of powerful weapons in the course of the nineteenth century – with tragic consequences on the battlefield. Military medical services were not equipped to cope with the massive number of casualties caused by modern weaponry; as a result, tens of thousands of wounded, sick and dying soldiers were left unattended after battle. This trend, which began with the Napoleonic Wars in Europe (1803–1815) and culminated in the American Civil War (1861–1865), set the stage for a number of influential humanitarian initiatives, both in Europe and in North America, aimed at alleviating the suffering of war victims and driving the systematic codification of modern IHL.

## 2. Humanitarian initiatives and first codifications

In Europe, the move towards codification of IHL was initiated by a businessman from Geneva, Henry Dunant. On a journey through northern Italy in 1859, Dunant witnessed a fierce battle between French and Austrian troops and, appalled at the lack of assistance and protection for more than 40,000 wounded soldiers, improvised medical assistance with the aid of the local population. After returning to Geneva, Dunant wrote *Un souvenir de Solferino* (*A Memory of Solferino*), in which he made essentially two proposals. First, independent relief organizations should be established to provide care to wounded soldiers on the battlefield and, second, an international agreement should be reached to grant such organizations the protection of neutrality. His ideas were well received in the capitals of Europe and led to the founding of the International Committee of the Red Cross (1863) and to the adoption by 12 States of the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (1864). The Convention adopted the emblem of the red cross on a white background – the colours of the Swiss national flag inverted – as a neutral protective sign for hospitals and those assisting the wounded and sick on the battlefield. A parallel development was triggered by the atrocities of the American Civil War and led to the adoption by the government of the United States of the so-called Lieber Code or, more accurately, the Instructions for the Government of Armies of the United States in the Field (1863). Although the Lieber Code was a domestic instrument and not an international treaty, it has influenced the development and codification of modern IHL well beyond the borders of the United States.

## 3. Towards universal codification

Since the adoption of these first instruments, the body of treaty IHL has grown in tandem with developments in warfare to become one of the most densely codified branches of international law today.

In 1906, the original Geneva Convention was extended to further improve the condition of sick and wounded soldiers and, in 1907, the Hague Regulations concerning the Laws and Customs of War on Land formulated the basic rules governing the entitlement to combatant privilege and prisoner-of-war status, the use of means and methods of warfare in the conduct of hostilities, and the protection of inhabitants of occupied territories from inhumane treatment. After the horrors of chemical warfare and the tragic experience of millions of captured soldiers during the Great War (World War I), these instruments were supplemented by the Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925) and, a few years later, a separate Geneva Convention relative to the Treatment of Prisoners of War (1929).

After the cataclysm of World War II, which saw massive atrocities committed not only against wounded, captured and surrendering combatants but also against millions of civilians in occupied territories, the 1949 Diplomatic Conference adopted a revised and completed set of four Geneva Conventions: the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), the Convention relative to the Treatment of Prisoners of War (Third Geneva Convention) and the Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention). The four Geneva Conventions of 1949 are still in force today and, with 196 States Parties, have become the most widely ratified treaties.<sup>44</sup>

With the establishment of the United Nations and the consolidation of the bipolar world order of the Cold War, war no longer took place mainly between sovereign States (international armed conflicts), but between governments and organized armed groups (non-international armed conflicts). On the one hand, former colonial powers were increasingly confronted with popular demands for independence and self-determination, resulting in wars of national liberation – from the Malay Peninsula through the Middle East to the Maghreb and sub-Saharan Africa. On the other hand, policies of mutual nuclear deterrence entailed a military stalemate between the United States and the Soviet Union, which in turn resulted in a proliferation of non-international proxy wars between governments and organized armed groups, in which each side was supported by one of the superpowers.

So far, the only provision of treaty law applicable to non-international armed conflicts had been common Article 3, which essentially requires the protection and humane treatment of all persons who are not, or no longer, taking an active part in hostilities. It was only in 1977 that two protocols additional to the Geneva Conventions were adopted to further develop treaty IHL. Additional Protocol I, “relating to the Protection of Victims of International Armed Conflicts,” not only improves and clarifies the protections already provided by the Geneva Conventions, it also contains the first systematic codification of IHL governing the conduct of hostilities. It also assimilates certain wars of national liberation against colonial domination, alien occupation and racist regimes to international armed conflicts, thus providing members of the insurgent forces the same rights

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44 See States party to the main treaties, ICRC reference document, available at: [http://www.icrc.org/applic/ihl/ihl.nsf/xsp/ibmmodres/domino/OpenAttachment/applic/ihl/ihl.nsf/5FE9C868227EDD1CC1257F330052D22D/%24File/IHL\\_and\\_other\\_related\\_Treaties.pdf?Open](http://www.icrc.org/applic/ihl/ihl.nsf/xsp/ibmmodres/domino/OpenAttachment/applic/ihl/ihl.nsf/5FE9C868227EDD1CC1257F330052D22D/%24File/IHL_and_other_related_Treaties.pdf?Open)

and privileges as are enjoyed by combatants representing a sovereign State. Additional Protocol II, “relating to the Protection of Victims of Non-International Armed Conflicts,” strengthens and further develops the fundamental guarantees established by common Article 3 for situations of civil war.

At the same time, efforts to avoid unnecessary suffering among combatants and to minimize incidental harm to civilians have resulted in a range of international conventions and protocols prohibiting or restricting the development, stockpiling or use of various weapons, including chemical and biological weapons,<sup>45</sup> incendiary weapons,<sup>46</sup> blinding laser weapons,<sup>47</sup> landmines and cluster munitions.<sup>48</sup> Moreover, States are now obliged to conduct a review of the compatibility of any newly developed weapon with the rules and principles of IHL.<sup>49</sup>

Concurrently, State practice has resulted in a considerable body of customary IHL applicable in all armed conflicts,<sup>50</sup> and the case-law of the Nuremberg and Tokyo Tribunals, the ICJ, the ad hoc Tribunals for the former Yugoslavia, Rwanda and Sierra Leone, and, most recently, the International Criminal Court has significantly contributed to the clarification and harmonious interpretation of both customary and treaty IHL.

Today, after 150 years of development, refinement and codification, the once fragmented and amorphous codes and practices of the past have emerged as a consolidated, universally binding body of international law regulating the conduct of hostilities and providing humanitarian protection to the victims of all armed conflicts. It is precisely at this point of relative maturity that the advent of the new millennium has posed fresh challenges to the fundamental achievements of IHL.

## 4. Current and emerging challenges

### 4.1 The “war on terror” and the rise of organized crime

No event embodies the global security challenges of the twenty-first century more than the dramatic terrorist attacks of 11 September 2001 in New York City and Washington, DC. Although, fortunately, these attacks have remained exceptional in terms of scale and magnitude, they triggered a veritable

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45 Biological Weapons Convention; Chemical Weapons Convention.

46 Protocol III to the Convention on Certain Conventional Weapons.

47 Protocol IV to the Convention on Certain Conventional Weapons.

48 Anti-Personnel Mine Ban Convention; Convention on Cluster Munitions.

49 AP I, Art. 36. On the regulation of weapons in IHL, see Chapter 3.V.4–5 and VI.4.

50 See Textbox 1, Chapter 1.II.2.

paradigm shift in national and international security policy. Within days of the attacks, the United States had declared a global “war on terror,” the UN Security Council had affirmed the right of self-defence against what appeared to be an attack by a transnational terrorist group, and NATO had for the first time in its history declared a case of collective self-defence based on Article 5 of the North Atlantic Treaty. The decade-long nuclear stalemate between superpowers was no longer perceived as the world’s foremost security concern, and the focus shifted to the vulnerability of modern, globalized society to the harm caused by sophisticated terrorist groups and other forms of transnational organized crime. The emergence of “war on terror” rhetoric, followed by military operations against suspected terrorist groups and individuals in Afghanistan, Yemen, Somalia and elsewhere, and the capture and transfer of hundreds of suspects to detention centres like the US internment facility at Guantanamo Bay Naval Station in Cuba raised a series of questions as to the nature and consequences of these operations under international law. Can all or part of the global “war on terror” be regarded as an armed conflict governed by IHL? If so, what are the geographic delimitations of this conflict and how does IHL interrelate with human rights law? What is the legal status of suspected terrorists, including those deprived of their liberty? Are they “unprivileged” combatants subject to direct attack? Or are they civilian criminals subject to arrest and prosecution under the rules of law enforcement? Once captured, are they entitled to combatant and prisoner-of-war status, or are they to be treated as civilian internees? What are the judicial guarantees and procedural rights of persons interned or prosecuted for their alleged involvement in transnational terrorism? What limits does the prohibition of torture and inhumane treatment impose on interrogation methods used to avert a perceived imminent terrorist threat? As will be shown, some of these questions have been largely resolved, while others remain controversial to this day. It is important to note, however, that the legal challenges related to transnational terrorism are not an isolated phenomenon, but are part and parcel of a broader trend towards transnational organized crime becoming a primary international security concern. Thus, similar questions with regard to the applicability and interpretation of IHL may also arise in other contexts where States resort to military means and methods in order to protect their internal and external security, whether in large-scale counter-narcotics campaigns, in multinational counter-piracy operations at sea, or even in particularly dramatic cases of urban gang warfare or mass hostage-taking. As a result of this trend, the distinction between peace and armed conflict, and between policing and military hostilities, is becoming increasingly blurred, and there is growing confusion as to the legal standards governing such situations.



- On the scope of application of IHL, see Chapter 2.
- On the legal status, treatment and procedural guarantees of persons deprived of their liberty, including “unprivileged” combatants, see Chapter 5.

#### 4.2 Asymmetric conflicts and the challenge to non-reciprocity

Since the end of the Cold War, armed conflicts have become increasingly asymmetric, typically pitting overwhelmingly powerful States against often poorly organized and equipped armed groups. Prime examples of such conflicts are the multinational campaign against the Taliban in Afghanistan and recurrent Israeli operations against Hamas in the Gaza Strip. The enormous technological and military superiority of the States involved has led opposition groups to avoid identification and defeat by moving underground, intermingling with the civilian population and engaging in various forms of guerrilla warfare. As a result, military confrontations often take place in the midst of densely populated areas, which not only exposes the civilian population to increased risks of incidental harm, but also facilitates the direct participation of civilians in hostilities. Moreover, unable to prevail in direct confrontations with the enemy, armed groups are increasingly tempted to resort to means and methods prohibited by IHL, such as misusing civilian clothing to perfidiously kill, wound or capture an adversary, conducting indiscriminate attacks, or even directly targeting civilians, humanitarian or medical personnel and their infrastructure (so-called “soft targets”). State armed forces, in turn, are often unable to properly identify the adversary and bear an increased risk of being attacked by persons they cannot distinguish from the civilian population. Overall, this trend has put considerable strain on the concepts of non-reciprocity and the equality of belligerents and, unfortunately, on the willingness of both State armed forces and non-State armed groups to accept their obligations under IHL.

#### 4.3 Privatization and civilianization of military and security activities

The armed forces have always been supported by civilians, including contractors and employees of civilian government services. Indeed, except in a few very specific cases,<sup>51</sup> IHL does not prohibit the outsourcing of military and security functions but even stipulates that civilians formally authorized to accompany the armed forces in an international armed conflict be

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51 Most notably, the 1949 Geneva Conventions require that “[e]very prisoner of war camp shall be put under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power” (GC III, Art. 39), and that “[e]very place of internment shall be put under the authority of a responsible officer, chosen from the regular military forces or the regular civil administration of the Detaining Power” (GC IV, Art. 99).

entitled to prisoner-of-war status upon capture.<sup>52</sup> The past decade, however, has seen an unprecedented trend towards the outsourcing of functions traditionally assumed by State armed forces to private military and security companies. In the recent wars in Iraq and Afghanistan, for example, tens of thousands of private contractors were deployed, and there were even periods when they clearly outnumbered the multinational forces on the ground. Depending on the context, such companies may assume a wide variety of functions, ranging from reconstruction, logistics, training and administrative services to the provision of security for civilian and military personnel and infrastructure, and from the maintenance and operation of complex weapon systems to guarding and interrogating detainees. Some of their activities are so closely related to combat operations that their personnel risk being regarded as directly participating in the hostilities and, depending on the circumstances, even as mercenaries.<sup>53</sup> The privatization of military functions also raises a number of serious humanitarian concerns. First, it must be emphasized that States cannot, through the practice of outsourcing, absolve themselves of their legal responsibilities under IHL. Thus, they remain responsible for ensuring that the private military and security companies that are contracted by them, or that operate or are incorporated in their territory, respect all applicable laws and regulations, including IHL. Moreover, whatever their functions or activities may be, private contractors never fall outside the protection of IHL. In short, contrary to popular perception, private military and security contractors do not operate in a legal void.

→ On civilian participation in hostilities, see Chapter 3.I.4.

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52 GC IV, Art. 4(4) and (5).

53 For the definition of mercenaries under IHL, see AP I, Art. 47 and CIHL, Rule 108.

### Textbox 3: The Montreux Document

The Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict (Montreux Document) is the product of a joint initiative launched in 2006 by the Swiss government and the ICRC. It aims to clarify existing international obligations relevant to the operations of private military and security companies in situations of armed conflict and to provide support and guidance for the implementation of those obligations. It focuses on practical issues of humanitarian concern and does not take a stance on the important, but separate, question of the legitimacy of using such companies in armed conflicts.

The Montreux Document consists of two parts. Part I restates the obligations of States, private military and security companies and their personnel under existing international law, including both IHL and human rights law, with regard to the operations of such companies in situations of armed conflict. In addressing the obligations of States, the Montreux Document differentiates between States using the services of such companies (contracting States), States in whose territory the companies operate (territorial States) and States in whose territory they are headquartered or incorporated (home States). Part I also addresses the obligations of “all other States,” the duties of private military and security companies and their personnel, and questions of superior responsibility and of State responsibility for the companies’ conduct. Part II provides a compilation of good practices designed to assist contracting, territorial and home States in complying with these legal obligations. The good practices are based largely on existing State practice in related areas and include measures such as introducing transparent licensing regimes, requiring adequate training and ensuring civil and criminal accountability.

The Montreux Document was developed between January 2006 and September 2008 with the support of governmental experts from 17 States and in consultation with representatives of civil society and of the private military and security industry. The Montreux Document does not create any new legal obligations, nor does it legitimize or provide a legal basis for the use of private military and security companies.

- For further details, see [\*Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict\*](#), ICRC and Federal Department of Foreign Affairs, Switzerland, August 2009, 44 pp.
- An updated list of supporting States and organizations can be found at: <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html>



S. Robertson/Crown

Unmanned aerial systems: a Predator aircraft ready for take-off, 2004.

#### 4.4 New weapons technologies

In many contemporary armed conflicts, military operations and weapon systems have attained an unprecedented level of complexity, involving the coordination of a great variety of interdependent human and technological resources in different locations spread across the globe. In conjunction with the advent of new technologies, such as remote-controlled weapons, means of cyber-warfare, nanotechnology and increasingly autonomous weapons, this development poses a significant challenge to the interpretation and application of IHL.

##### (a) Remote-controlled drones

For example, the systematic use of remote-controlled drones for counter-terrorist operations in countries such as Afghanistan, Pakistan and Yemen raises questions as to the applicability of IHL to these operations and, consequently, as to the rules governing the use of lethal force against the persons targeted. Where IHL is applicable, the systematic use of drones raises concerns with regard to the reliability of the targeting information used, the exposure of the civilian population to incidental harm, and the inability of the attacker to care for the wounded, or to capture rather than kill.

##### (b) Cyber-warfare

Another relatively recent development is the expansion of military operations into cyberspace, the so-called “fifth domain of warfare” next to land, sea, air and space. While it is generally uncontested that IHL would also apply to cyber operations conducted in relation to an existing armed

conflict, it is unclear whether cyber operations, in and of themselves, could give rise to an armed conflict and, thus, trigger the applicability of IHL. Also, once cyber operations are governed by IHL, questions arise as to what exactly amounts to “attacks” – defined in IHL as “acts of violence”<sup>54</sup> – in cyberspace, and how the proportionality of “collateral damage” to civilian infrastructure should be assessed, particularly in view of the fact that military and civilian computer networks are generally interconnected. Also, what precautions can and must be taken to avoid the risk of excessive incidental damage to civilian objects whose functioning depends on computer systems (hydro-electric and nuclear plants, hospitals, etc.)? How can it be ensured that this damage does not ultimately cause erroneous or excessive harm to persons and objects protected against direct attack? What does the duty of combatants to distinguish themselves from the civilian population mean in cyberspace? Cyber-warfare also raises legal questions of fundamental importance in other areas of international law, such as *jus ad bellum* and the law of neutrality. These questions must be resolved through careful interpretation of existing IHL treaties and customary rules. The current discussion on the interpretation and application of international law in cyberspace involves a growing number of academic, national and international fora, and it will certainly take time for a consensus to emerge in that regard. This ongoing process, however, should not lead to the misperception of a legal void in this “fifth domain,” but must build on the premise that existing international law fully applies in cyberspace. In situations of armed conflict, that includes all relevant rules and principles of IHL.



Reuters

Personnel at the Air Force Space Command Network Operations & Security Center at Peterson Air Force Base in Colorado Springs, Colorado, 2014.

54 API, Art. 49(1).

### Textbox 4: Tallinn Manual on the International Law Applicable to Cyber Warfare

In 2009, the NATO-affiliated Cooperative Cyber Defence Centre of Excellence launched a multi-year project aimed at producing the *Tallinn Manual on the International Law Applicable to Cyber Warfare* (*Tallinn Manual*).<sup>55</sup> The project brought together experts in international law, professional and academic, predominantly from NATO and NATO-allied military circles, with observers from the ICRC, the United States Cyber Command and the Centre of Excellence, in an effort to examine how existing rules and principles of international law can be applied to cyber-warfare.

The *Tallinn Manual* is intended to restate and clarify international law governing cyber-warfare, including both the law governing the use of inter-State force (*jus ad bellum*), and the law governing the conduct of international and non-international armed conflicts (*jus in bello*). It does not address cyber activities occurring below the threshold of “use of force” (*jus ad bellum*) or of an armed conflict (*jus in bello*),<sup>56</sup> nor does it examine human rights law, international criminal law or international telecommunications law. It is divided into ninety-five “blackletter” rules, each accompanied by a commentary. The “blackletter” rules constitute a restatement of the international law of cyber conflict. The commentary accompanying each rule identifies the legal basis on which the rule was developed, expands on its application in practice and sets forth differing positions as to its scope or application.

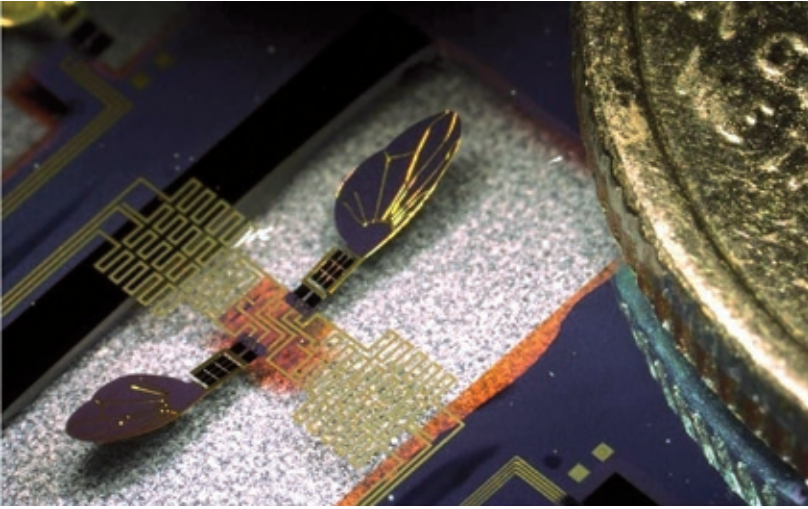
The *Tallinn Manual* process is currently the most significant initiative to restate and clarify international law as it applies to cyber-warfare. It should be noted, however, that the *Manual* is not legally binding and does not necessarily represent the views of NATO or any other organization, or of any State. Instead, it reflects solely the opinions of the participating experts, all acting in their individual capacity. Moreover, it does not make any recommendations with regard to how the law should be clarified and developed; it simply restates and comments on the law as the participating experts see it. It was published in 2013 by Cambridge University Press.

- See Michael Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, Cambridge, 2013, 300 pp.

55 The full text of the *Tallinn Manual* is available at: [http://issuu.com/nato\\_ccd\\_coe/docs/tallinmanual](http://issuu.com/nato_ccd_coe/docs/tallinmanual)

56 To determine what situations qualify as armed conflicts under IHL, see Chapter 2.III–V.





US Army/RDECOM

The United States Army works with industry and universities to study micro-robotics and develop technologies allowing soldiers to see threats lurking just beyond their range of vision using autonomous robots the size of bats and hummingbirds and even as small as fruit flies, 2012.

### (c) Ongoing developments: Nanotechnology and autonomous weapons

Other technological developments of potential concern to IHL are the introduction of nanotechnology and increasingly autonomous weapons on contemporary battlefields. While nanotechnology is already being used in current military operations, most notably to enhance the performance of certain ammunitions and armour plating, the development of fully autonomous robots capable of taking targeting decisions independently of human involvement may still be decades away. However, this prospect clearly raises questions as to the operational control of such weapon systems and the legal and criminal responsibility for the harm done by them in case of actions violating IHL. The most important observation to be made here is that the responsibility to ensure that all means and methods used in an armed conflict comply with IHL will always remain with the parties to that conflict. Moreover, any individual act or omission amounting to criminal involvement in violations of IHL will remain subject to prosecution and punishment, even if the ultimate “decision” to commit the crime in question was taken by a machine based on programs and algorithms rather than on real-time commands by a human operator.

- On the duty of States to conduct a legal review of new weapons technologies, see Chapter 3.V.5.



J. Nicolas/Sipa Press

Keysaney Hospital in Mogadishu, Somalia, 1991. Note the red cross and red crescent emblems and the instructions prohibiting entry with weapons.

#### 4.5 Respect for IHL

The legal and practical difficulties arising as a result of changes in the contemporary security environment have caused confusion and uncertainty not only about the distinction between armed conflict and law enforcement, but also about the traditional categorization of persons as civilians and combatants and the temporal and geographic delimitation of the “battlefield.” As most poignantly evidenced by the controversies surrounding the legal framework governing the various aspects of the United States’s “war on terror,” that confusion and uncertainty have also provoked doubt about the adequacy of existing IHL to cope with the emerging security challenges of the twenty-first century. In response, various key stakeholders have launched important processes aimed at analysing, reaffirming and clarifying IHL in areas of particular humanitarian concern, including, most recently, the ICRC’s initiative on strengthening legal protection for victims of armed conflicts and the joint initiative of Switzerland and the ICRC on strengthening mechanisms for the implementation of IHL (see Textbox 9, Chapter 7.III.4.b). These processes remain ongoing, but two preliminary observations can already be drawn from the preparatory work and initial discussions. First, there may indeed be certain areas of IHL that require further strengthening in order to better protect individuals exposed to contemporary armed conflicts. The most urgent humanitarian need, however, is not to adopt new rules but rather to ensure actual compliance with the existing legal framework.

- On the implementation and enforcement of IHL, see Chapter 7.
- On the special role of the ICRC with regard to the implementation and enforcement of IHL, see Chapter 8.



### To go further (A Brief History of IHL and Contemporary Challenges for IHL)<sup>57</sup>

- *The Story of an Idea*, film, ICRC, 2008. Available at: <http://www.youtube.com/watch?v=olwB-Y6FUjY>
- Henry Dunant, *A Memory of Solferino*, ICRC, Geneva, 1986.
- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, [Chapter 3: Historical development of international humanitarian law](#), pp. 139–148.
- Mary Ellen O’Connell, “Historical development and legal basis,” in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 32nd ed., Oxford University Press, Oxford, 2013, pp. 1–42.
- Gabor Rona, “Interesting times for international humanitarian law: Challenges from the ‘war on terror’,” *The Fletcher Forum of World Affairs*, Vol. 27(2), Summer/Fall 2003, pp. 55–74.
- Robin Geiss, “[Asymmetric conflict structures](#),” *IRRC*, Vol. 88, No. 864, December 2006, pp. 757–777.
- “[Private military companies](#),” *IRRC*, Vol. 88, No. 863, September 2006.
- “[Business, violence and conflict](#),” *IRRC*, Vol. 94, No. 887, Autumn 2012.
- “[New technologies and warfare](#),” *IRRC*, Vol. 94, No. 886, Summer 2012.
- ICRC Advisory Services on International Humanitarian Law, [What Is International Humanitarian Law?](#)
- “Contemporary challenges for IHL,” webpage, ICRC. Available at: <https://www.icrc.org/en/war-and-law/contemporary-challenges-for-ihl>

### *How Does Law Protect in War?*

- Case No. 85, United States, [The Prize Cases](#)
- Case No. 263, [United States, Status and Treatment of Detainees held in Guantánamo Naval Base](#)
- Case No. 286, [The Conflict in Western Sahara](#)
- Case No. 288, [United States, The September 11 2001 Attacks](#)

57 All ICRC documents available at: [www.icrc.org](http://www.icrc.org)



# Chapter 2

## Scope of application of IHL



M. Kokić/ICRC

Kabul, Afghanistan. Military Training Centre, 2007. A member of the International Security Assistance Force contingent provided by the former Yugoslav Republic of Macedonia on patrol.

## Structure

- I. Relevance and definition of the term “armed conflict”
- II. Distinction between international and non-international armed conflicts
- III. International armed conflicts
- IV. Belligerent occupation
- V. Non-international armed conflicts
- VI. Armed conflicts involving foreign intervention

### In a nutshell

- Once an armed conflict exists, any action taken for reasons related to that conflict is governed by IHL.
- An armed conflict exists whenever recourse is had to armed force or belligerent occupation between States (*international armed conflicts*), or when protracted armed violence takes place between governmental authorities and organized armed groups or between such groups (*non-international armed conflicts*).
- Belligerent occupation exists to the extent, and for as long as, one State maintains military authority over all or part of the territory of another State, even if such occupation encounters no armed resistance.
- Armed conflicts involving foreign (including multinational) intervention are deemed to be international or non-international in nature depending on whether they involve armed confrontations between States, or between States and organized armed groups.
- Legally speaking, there are no other types of armed conflict. Internal disturbances and tensions – riots, isolated and sporadic acts of violence and similar acts – do not amount to armed conflict.

### To go further<sup>58</sup>

- *Panel Discussion – Scope of the law in armed conflict*, ICRC, February 2015. Recording available at: <https://www.icrc.org/en/event/scope-of-law>
- ICRC e-learning module, *When does international humanitarian law apply?* Available at: <http://www.icrcproject.org/elearning/en/ihl/M4/index.html>
- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, [Chapter 2: International humanitarian law as a branch of public international law](#), pp. 121–136.
- Jelena Pejic, “[Extraterritorial targeting by means of armed drones: Some legal implications](#),” *IRRC*, May 2015.
- “[Scope of application of the law in armed conflict](#),” *IRRC*, Vol. 96, No. 893, Spring 2014.
- “[Typology of armed conflicts](#),” *IRRC*, Vol. 91, No. 873, March 2009.

Attempts to restrain and regulate the conduct of belligerent parties have always been accompanied by disagreements over which situations should be governed by the relevant rules. Precise definitions of concepts such as “war,” “armed conflict” or “occupation” were adopted to clarify this question, but belligerents soon began to evade their obligations on the grounds that either the situation at hand or the opposing party had failed to meet the legal criteria required for the applicability and protection of the law. It is therefore of particular importance to examine the treaty terminology and customary concepts determining and delimiting the temporal, territorial, material and personal scope of applicability of contemporary IHL.

## I. RELEVANCE AND DEFINITION OF THE TERM “ARMED CONFLICT”

IHL is specifically designed to govern armed conflicts. As such, it contains detailed provisions regulating the means and methods of warfare and the protection of persons and objects having fallen into the power of a belligerent party. Once an armed conflict exists, any action taken for reasons related to that conflict must comply with IHL. Conversely, IHL does not apply to inter-State confrontations that fall short of armed conflict, or to internal dis-

<sup>58</sup> All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

turbances and tensions, such as riots, isolated and sporadic acts of violence and similar acts not amounting to armed conflict.<sup>59</sup>

In the absence of an armed conflict, therefore, any difference between States and any question of individual protection must be resolved in accordance with the law applicable in peacetime. For example, nationals of one State who are detained in another State will be protected by human rights law and, depending on the circumstances, may enjoy the diplomatic and consular protection of their State of origin or benefit from protection under international refugee law. However, they will not be entitled to the status and protection afforded by the 1949 Geneva Conventions, such as the right of prisoners of war or civilian internees to receive visits from the ICRC. Also, in situations not reaching the threshold of armed conflict, any use of force or other exercise of authority by States against groups and individuals within their jurisdiction remains governed by human rights law, and any violence or other harm caused by such groups and individuals remains a matter of law enforcement governed primarily by national law.

Although the existence of an armed conflict is an absolute prerequisite for the applicability of IHL as a whole, some of the duties it stipulates may apply already in peacetime, and certain of its protections may extend beyond the end of an armed conflict. For example, many weapons treaties prohibit not only the use, but also the development, stockpiling, production and sale of certain weapons by States, and require them to subject the development or acquisition of any weapon to a legal review.<sup>60</sup> States also have peacetime duties with respect to IHL training and dissemination and in relation to the investigation and prosecution of serious violations of IHL (war crimes).<sup>61</sup> Moreover, persons deprived of their liberty for reasons related to an armed conflict remain protected by IHL until they have been released and repatriated or their status has otherwise been normalized, if necessary even years after the end of the conflict. Likewise, IHL remains applicable in territories that remain occupied after the cessation of active hostilities until a political solution for their status has been found.

Despite the significant legal and humanitarian consequences triggered by the existence of an armed conflict, treaty law provides no comprehensive and precise definition of what constitutes an armed conflict. The interpretation

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59 AP II, Art. 1(2).

60 See Chapter 3.V.5.

61 See Chapter 7, Sections II.2. and V.3.

and clarification of that concept is therefore largely left to State practice, international case-law and legal scholars.<sup>62</sup>

## II. DISTINCTION BETWEEN INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICT

IHL treaties distinguish between two types of armed conflict: (a) *international armed conflicts*, which occur between two or more States, and (b) *non-international armed conflicts*, which take place between States and non-governmental armed groups, or between such groups only.

This dichotomy between international and non-international armed conflicts is a result of political history rather than military necessity or humanitarian need. For centuries, sovereign States have regulated their relations in both peace and war through treaties and custom, a tradition based on mutual recognition of national sovereignty and international legal personality. Conversely, governments have long been reluctant to subject their efforts to maintain law and order and public security within their territorial borders to the purview of international law. The incorporation of the concept of non-international armed conflict in common Article 3 therefore constituted a landmark in the development and codification of IHL. From that moment on, organized armed groups were considered “parties” to an armed conflict with their own obligations under international law, irrespective of any formal recognition of belligerency by the opposing State. At the same time, the contracting States emphasized that the provisions of common Article 3 “shall not affect the legal status of the Parties to the conflict.”<sup>63</sup> In other words, treaty recognition of organized armed groups as belligerent parties implies neither that they are legitimate nor that they have full legal personality under international law. This historical background has shaped the current body of treaty IHL, which is, as a result, much more extensive for international than for non-international armed conflicts, even though the humanitarian and military rationales are essentially the same for both types of conflict.<sup>64</sup>

Despite the practical similarities, however, there are decisive differences between international and non-international armed conflicts, and this makes it indispensable to maintain the distinction between them.

62 On the relevance and definition of armed conflict, see ICRC, [How is the Term “Armed Conflict” Defined in International Humanitarian Law](#), Opinion Paper, March 2008.

63 GC I–IV, common Art. 3.

64 For a historical review of the developments leading to the adoption of common Article 3, see ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., ICRC/Cambridge University Press, 2016.

The most important difference concerns the threshold of violence required for a situation to be deemed an armed conflict. Given that *jus ad bellum* imposes a general prohibition on the use of force between States, any such use can be legitimately presumed to express belligerent intent and to create a situation of international armed conflict, which must be governed by IHL. By contrast, within their own territory, States must be able to use force against groups or individuals for the purpose of law enforcement; and the use of force by such groups or individuals against each other or against governmental authorities generally remains a matter of national criminal law. As a consequence, the threshold of violence required to trigger a non-international armed conflict and, thereby, the applicability of IHL is significantly higher than for an international armed conflict. Another important reason for maintaining the distinction between international and non-international armed conflict is the position taken by many States that equating the two types of armed conflict could be perceived as providing armed opposition groups with international status and might therefore undermine State sovereignty and encourage rebellion.

It is important to note that, in terms of legal concept, the categories of international and of non-international armed conflict are absolutely complementary in that they cover all conceivable situations triggering the applicability of IHL. Legally speaking, no other type of armed conflict exists. As will be shown, this does not preclude the two types of armed conflict from coexisting, or a situation from evolving from one type of armed conflict into another.

### III. INTERNATIONAL ARMED CONFLICTS

#### 1. Treaty law

The classic form of armed conflict is international in character and waged between two or more States. Today, IHL governing situations of international armed conflict is codified primarily in the Hague Regulations of 1907, the four 1949 Geneva Conventions and Additional Protocol I. The treaty law is supplemented by a rich body of customary IHL.

Common Article 2 provides that:

“[i]n addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them;<sup>65</sup>

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65 GC I–IV, common Art. 2(1).





ICRC

Bombing in the Mekong Delta, Viet Nam, 1974.

to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”<sup>66</sup>

For States that have ratified Additional Protocol I, the situations referred to in common Article 2 also include:

“armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.”<sup>67</sup>

Thus, the existence of an international armed conflict essentially depends on two elements, namely the legal status of the belligerent parties and the nature of the confrontation between them.

## 2. Legal status of the belligerent parties

Armed conflicts derive their international character from the fact that they occur between High Contracting Parties to the 1949 Geneva Conventions,

<sup>66</sup> GC I–IV, common Art. 2(2).

<sup>67</sup> AP I, Art. 1(4).

which necessarily means States.<sup>68</sup> States party to Additional Protocol I have further agreed to recognize certain types of national liberation movements as “parties” to an international armed conflict although they do not, at the time, qualify as sovereign States under international law.<sup>69</sup> Armed confrontations between parties that are neither States nor national liberation movements cannot be regarded as international armed conflicts but constitute either non-international armed conflicts or other situations of violence.

### 3. Nature of the confrontation: “war,” “armed conflict” and “occupation”

International armed conflicts are belligerent confrontations between two or more States. Traditionally, States expressed their belligerent intent (*animus belligerendi*) through formal declarations of war, which, *ipso facto*, created a political state of war and triggered the applicability of the law of war (*jus in bello*) between them, even in the absence of open hostilities. Strictly speaking, the traditional law of war is broader than IHL in that it comprises not only humanitarian rules, but essentially all norms governing the relations between belligerent States. This also includes provisions on diplomatic, economic and treaty relations, and on the legal position of neutral States. At the same time, the traditional law of war is narrower than IHL in that it applies only during a formal state of war between States, whereas IHL establishes minimum standards of humanity that are applicable in any armed conflict, irrespective of the existence of a political state of war.

Over the course of the twentieth century, formal declarations of war became increasingly uncommon, and the political concept of “war” was largely replaced by the factual concept of “armed conflict.” Today, an international armed conflict is presumed to exist as soon as a State uses armed force against another State, regardless of the reasons for or intensity of the confrontation, and irrespective of whether a political state of war has been formally declared or recognized. Although rarely referred to in case-law or

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68 The 1949 Geneva Conventions have been universally ratified, i.e. by 196 States (February 2016).

69 See, for instance, AP I, Art. 96(3), which gives such movements the possibility – by means of a unilateral declaration addressed to the depositary – to undertake to apply the 1949 Geneva Conventions and Additional Protocol I by means of a unilateral declaration addressed to the depositary. At the time of writing, this possibility had been used only once, namely by the Polisario Front in June 2015. See *Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I), Listes des réserves et déclarations, Autorité ayant fait la déclaration de l'article 96, paragraphe 3*, webpage, Swiss Federal Department of Foreign Affairs. Available at: <https://www.eda.admin.ch/eda/fr/dfae/politique-exterieure/droit-international-public/traites-internationaux/depositaire/protection-des-victimes-de-la-guerre/protocole-additionnel-aux-conventions-de-gen%C3%A8ve-du-12-ao%C3%BBt-1949-relatif-a-la-protection-des-victimes-des-conflits-armes-internationaux-%28protocole-i%29.html>

scholarly literature, belligerent intent remains an implied prerequisite for the existence of an international armed conflict. This means that the applicability of IHL cannot be triggered by merely erroneous or accidental causation of harm, or by violence on the part of individuals acting without the endorsement or acquiescence of the State they represent. Acts of this kind may entail the legal consequences of State responsibility, such as a duty of reparation, but do not amount to armed conflict for want of belligerent intent. In the presence of such intent, however, even minor instances of armed violence – such as individual border incidents, the capture of a single prisoner, or the wounding or killing of a single person – may be sufficient for IHL governing international armed conflicts to apply.<sup>70</sup>

A number of caveats apply in this respect. In the special case of national liberation movements, the required threshold of violence may be more similar to that of situations of non-international armed conflict, depending on whether the factual circumstances more closely resemble the relationship between sovereign States or that between a governmental authority and a non-State armed group. Furthermore, in two cases, an international armed conflict may also be said to exist in the absence of open hostilities. First, the applicability of IHL can still be triggered by a formal declaration of war. Second, IHL automatically applies where the territory of one State is totally or partially occupied by another State without the latter's genuine consent, even when such occupation meets with no armed resistance.

In sum, in the absence of a formal declaration of war, belligerent intent is derived by implication from factual conditions rather than from official recognition of a political state of war. The existence of an international armed conflict is determined, therefore, primarily by what is actually happening on the ground.<sup>71</sup> As a result, a situation may amount to an international armed conflict and trigger the applicability of IHL even though one of the belligerent States does not recognize the government of the adverse party<sup>72</sup> or altogether denies the existence of a state of war.<sup>73</sup>

70 ICRC, [How is the Term “Armed Conflict” Defined in International Humanitarian Law?](#), Opinion Paper, March 2008; ICRC, *Commentary on the First Geneva Convention*, 2nd ed., 2016, *op. cit.* (note 64), Art. 2; See also ICTY, *The Prosecutor v. Dusko Tadić a/k/a “Dule,”* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, Case No. IT-94-1-AR72, para. 70.

71 ICTY, *The Prosecutor v. Fatmir Limaj et al.*, Trial Chamber II (Judgment), 30 November 2005, Case No. IT-03-66-T, para. 89; ICTY, *The Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Trial Chamber II (Judgment), 10 July 2008, Case No. IT-04-82-T, para. 176; ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Trial Chamber I (Judgment), Case No. ICTR-96-4-T, 2 September 1998, para. 603.

72 GC III, Art. 4(A)(3).

73 GC I–IV, common Art. 2.

## 4. Temporal and territorial scope of international armed conflicts

### (a) Temporal scope of international armed conflicts

The applicability of IHL governing international armed conflicts begins with a declaration of war or, in the absence of such declaration, with the actual use of armed force expressing belligerent intent. It is also triggered by the mere fact of one State invading another with a view to occupying all or part of its territory, even when such invasion meets with no armed resistance.

An international armed conflict ends with a peace treaty or an equivalent agreement, or with a unilateral declaration or other unambiguous act expressing the termination of belligerent intent, such as a capitulation, declaration of surrender, or unconditional, permanent and complete withdrawal from previously contested territory. Today, international armed conflicts rarely end with the conclusion of a formal peace treaty; they more often tend to terminate in a slow and progressive decrease in intensity, unstable cease-fires and/or the intervention of peacekeepers.

Ultimately, the end of an armed conflict, like its beginning, must be determined on the basis of factual and objective criteria. In this respect, the cessation of hostilities, a ceasefire or armistice, and even a peace treaty do not necessarily terminate an international armed conflict; rather, when taken in conjunction with other elements, such factors are indicative of the belligerents' intention to bring the armed conflict to a permanent conclusion. The decisive criterion must always be that the armed confrontation between the belligerent parties has come to a lasting end in circumstances that can reasonably be interpreted as a general cessation of military operations.

The temporal scope of an international armed conflict has to be distinguished from the temporal scope of application of IHL rules related to those conflicts. Indeed, the fact that a conflict has ended does not preclude certain aspects of IHL from continuing to apply even beyond the end of the conflict. For example, persons deprived of their liberty for reasons related to an armed conflict remain protected by IHL until they have been released and repatriated or their status has otherwise been normalized,<sup>74</sup> and former belligerents also remain bound by obligations with a view to restoring family links,<sup>75</sup> accounting for the dead and the missing and similar humanitarian endeavours.<sup>76</sup> As the ICTY observed, "International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities

74 GC III, Art. 5; GC IV, Art. 6(4). See also Chapter 5, Sections II.2.c. and III.1.b.

75 See Chapter 6.I.2.b.

76 See Chapter 4, Sections VI and VII.6.

until a general conclusion of peace is reached (...) Until that moment, international humanitarian law continues to apply in the whole territory of the warring States (...) whether or not actual combat takes place there.”<sup>77</sup>

### (b) Territorial scope of international armed conflicts

In terms of territorial scope, the interpretation of the ICTY does not imply that IHL cannot apply outside the territory of the belligerent parties. It is merely intended to clarify that the applicability of IHL cannot be limited to those areas of belligerent States where actual combat takes place, but that it extends to any act having a nexus to the conflict (i.e. carried out for reasons related to the conflict). Indeed, already under the traditional law of war, the relations between belligerent States are governed by that law wherever they meet, even though the law of neutrality may prevent them from engaging in hostilities outside their respective territories, in international airspace or on the high seas.

### To go further (International armed conflicts)<sup>78</sup>

- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, [Chapter 2: International humanitarian law as a branch of public international law](#), pp. 126–127.
- Tristan Ferraro, “[IHL applicability to international organisations involved in peace operations](#),” in *Proceedings of the 12th Bruges Colloquium – International Organisations’ Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility*, 20–21 October 2011, Collegium No. 42, Autumn 2012, College of Europe/ICRC, pp. 15–22.
- “[Scope of application of the law in armed conflict](#),” *IRRC*, Vol. 96, No. 893, Spring 2014.
- ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., ICRC/Cambridge University Press, 2016.

### How Does Law Protect in War?

- Case No. 158, [United States, \*United States v. Noriega\*, B. Place of Detention, para. II. A](#)
- Case No. 211, ICTY, *The Prosecutor v. Tadić*, [Doc. A](#), paras 67–70 and [Doc. B](#), para. 562

<sup>77</sup> ICTY, *The Prosecutor v. Dusko Tadić*, *op. cit.* (note 70), para. 70.

<sup>78</sup> All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

## IV. BELLIGERENT OCCUPATION

### 1. Treaty law

IHL governing international armed conflicts also applies “to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”<sup>79</sup> In essence, belligerent occupation occurs when one State invades another State and establishes military control over part or all of its territory. Accordingly, Article 42 of the Hague Regulations states: “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”

Moreover, for States party to Additional Protocol I, Article 1(4) of the Protocol stipulates that IHL governing international armed conflicts also applies to situations where the occupied territory does not belong to a “High Contracting Party” (i.e. a State), but to a people fighting against alien occupation in the exercise of its right of self-determination.

### 2. Prerequisite of “effective control”

Whether a territory is occupied within the meaning of IHL is a question of fact and, in essence, depends on whether the occupying power has established effective control over the territory in question. The existence of occupation depends on a State’s factual ability to assume the *de facto* governmental functions of an occupying power, most notably to ensure public security, and law and order, and not by its willingness to do so. Therefore, unless an occupying power actually loses military control over the territory in question, therefore, it cannot escape its obligations under IHL by choosing not to exercise effective control.<sup>80</sup>

Effective control does not necessarily have to be exercised directly through the armed forces of the occupying power. Belligerent occupation can also exist when a foreign State exerts overall control over local authorities who, in turn, exercise their direct governmental control as *de facto* State agents on behalf of the occupying power.<sup>81</sup> Therefore, States cannot evade their obligations under occupation law through the use of proxies.

79 GC I–IV, common Art. 2(2).

80 See also ICRC, *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory*, report prepared and edited by Tristan Ferraro, ICRC, Geneva, March 2012, p. 19.

81 *Ibid.*, p. 23. See also ICTY, *The Prosecutor v. Dusko Tadić a/k/a “Dule,”* Trial Chamber (Judgment), 7 May 1997, Case No. IT-94-1-T, para. 584. This was confirmed in ICTY, *The Prosecutor v. Tihomir Blaškić,* Trial Chamber (Judgment), 3 March 2000, Case No. IT-95-14-T, para. 149, and, implicitly, in ICJ, *Armed Activities on the Territory of the Congo (DRC v. Uganda),* Judgment, 19 December 2005, para. 177.

Article 42 of the Hague Regulations clearly states that a territory is considered occupied only to the extent effective control has actually been established and can be exercised. In practice, therefore, delimiting the territorial confines of an occupied area can be extremely difficult, particularly in the case of partial occupation or where the situation on the ground can change rapidly. In any event, the legal consequences of belligerent occupation do not depend on a minimum duration or minimum geographic extension of occupation, but simply on the actual existence of effective territorial control. The inhabitants of occupied territory are collectively considered as having fallen “into the hands” of the occupying power and are therefore entitled to the full protection of the Fourth Geneva Convention immediately upon establishment of effective control.

### 3. Invasion phase

While the text of Article 42 of the Hague Regulations is clear that territory cannot be considered occupied during the invasion preceding the establishment of effective control, the extent to which the Fourth Geneva Convention applies during that phase is less clear. According to the so-called “Pictet theory,” the Hague Regulations are based on a strictly territorial notion of occupation, whereas the Fourth Geneva Convention extends its protection to all individuals “who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”<sup>82</sup> Given the Convention’s focus on individual protection, some provisions set out in Part III, Section III, on occupied territories, should apply even during the invasion phase, commensurate with the level of control exercised and to the extent that the civilian population has already come under the *de facto* authority of the advancing hostile forces.<sup>83</sup> Others argue that, prior to the establishment of effective territorial control, only those provisions of the Convention that are “common to the territories of the parties to the conflict and to occupied territories”<sup>84</sup> apply, thus providing a more limited framework of protection for the population of invaded territories. Irrespective of which approach will ultimately prevail, it should be remembered that applicable treaty provisions are always supplemented by universally binding customary law, such as the fundamental guarantees reflected in common Article 3 and in Article 75 of Additional Protocol I.

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82 GC IV, Art. 4.

83 ICRC, *Expert Meeting, op. cit.* (note 80), pp. 24–26; ICTY, *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Trial Chamber (Judgment), Case No. IT-98-34-T, 31 March 2003, para. 218.

84 That is, only GC IV, Part III, Section I (Arts 27–34).

#### 4. End of occupation

Although some territories, such as the occupied Palestinian territory, have been occupied for decades, the occupying power's role as a *de facto* authority remains by definition temporary. Determining the end of belligerent occupation, however, has rightly been described as a "thorny task" fraught with political and legal issues of significant complexity.<sup>85</sup> In principle, there are three basic ways in which a situation of occupation can come to an end: (a) withdrawal or loss of effective control, (b) genuine consent to a foreign military presence, or (c) political settlement.

##### (a) Withdrawal or loss of effective control

Of course, the most obvious way for a belligerent occupation to end is a full and voluntary withdrawal of the occupying forces and the restoration of effective control on the part of the local government. Alternatively, the displaced territorial State may attempt to regain control over areas under hostile occupation through renewed hostilities. The 1949 Geneva Conventions also anticipate the possibility of hostile activities against the occupying power from within the occupied territory, including through the formation of armed resistance movements.<sup>86</sup> The fact that an occupying power is confronted with renewed hostilities or armed resistance does not necessarily terminate the state of occupation. As long as the occupying power maintains its capacity to regain military control of the territory at any time it so desires, even hostilities of significant intensity or temporary restrictions of its territorial control do not terminate its status and obligations as an occupier under IHL.<sup>87</sup>

However, as soon as the ability of the occupying power to impose its military authority is effectively eliminated for any length of time, the areas concerned can no longer be regarded as occupied and the humanitarian obligations of the former occupying power towards their inhabitants are limited to those of any other party to the conflict. Situations of belligerent occupation that were ended through voluntary or forced withdrawal include the countries occupied by Germany and Japan in the course of World War II. A more contentious case in point is the Israeli withdrawal from the Gaza Strip in September 2005. Although Israel no longer has a permanent military presence in the Gaza Strip, there is ongoing controversy as to whether and, if so, to what extent

85 ICRC, *Occupation and Other Forms of Administration*, *op. cit.* (note 80), p. 27.

86 See GC III, Art. 4(A)(2) (organized resistance groups operating within occupied territory) and GC IV, Arts 5(2) and 68 (hostile activities in occupied territory).

87 This view was already taken by the US Military Tribunal at Nuremberg after World War II. See "Trial of Wilhelm List and others, United States Military Tribunal, Nuremberg, 8th July, 1947, to 19th February, 1948 (The Hostages Trial)," in *Law Reports of Trials of War Criminals*, selected and prepared by the United Nations War Crimes Commission, Vol. VIII, His Majesty's Stationery Office, London, 1949, p. 56. Available at: [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Law-Reports\\_Vol-8.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-8.pdf)



Israel's sporadic military incursions into the Gaza Strip, in conjunction with its enforcement of sea blockades, border closures and air space control, entail a continuation of its obligations as an occupier under IHL.<sup>88</sup>

The ICRC has argued that, in some specific and exceptional circumstances, an occupying power would remain bound by certain obligations under the law of occupation despite the physical withdrawal of its armed forces from an occupied territory. In particular, when an occupying power retains, within such territory, key elements of authority or other important governmental functions, the law of occupation should continue to apply within the relevant territorial and functional limits.

### **(b) Genuine consent to a foreign military presence**

Situations of belligerent occupation can also come to an end if the territorial State consents to the continued presence of foreign armed forces. Such consent is usually – but not necessarily – given in conjunction with a full or partial transfer of authority from the former occupier to the local government. Clearly, in order to be valid, such consent must be genuine and cannot be based on a coerced agreement between the occupying power and a local regime, which would *de facto* stay under the control of the occupying power.

In order to avoid any potential abuse of such agreements, the Fourth Geneva Convention provides that the inhabitants of occupied territories “shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.”<sup>89</sup>

Situations of belligerent occupation that ended through the transfer of authority to the local government without the complete withdrawal of the former occupation forces include the Federal Republic of Germany (5 May 1955) and Japan (28 April 1952) after World War II, and Iraq after 30 June 2004.<sup>90</sup>

### **(c) Political settlement of the territorial status**

Finally, a situation of belligerent occupation can end without the withdrawal of the occupation forces through a political settlement involving the annexation by the occupying power of all or parts of the occupied territory or,

88 See also ICRC, *Occupation and Other Forms of Administration*, *op. cit.* (note 80), pp. 47–48.

89 GC IV, Art. 47.

90 On the differences between Germany, Japan and Iraq, see, for example, ICRC, *Occupation and Other Forms of Administration*, *op. cit.* (note 80), pp. 46–47 ff.

alternatively, the establishment of an independent State on such territory. Again, in order to be valid, such a political settlement must be based on an international agreement expressing the genuine consent of the territorial State as to the future legal status of the territory in question. In principle, the required consent can be replaced by a judgment of the ICJ where the States involved have submitted to the Court's jurisdiction. In the absence of consent by the territorial State, it is further conceivable that an occupied territory could gain political independence with the military support of the occupying power in conjunction with widespread recognition by the international community as a sovereign State. Unilateral annexations by the occupying power, however, may be binding as a matter of national law but have no effect on the legal status of the occupied territories under international law. In particular, the UN Security Council has confirmed the status of the West Bank, East Jerusalem and the Syrian Golan Heights as occupied territories (1980).<sup>91</sup>

### 5. Multinational administration of territories

Recent years have seen novel forms of multinational territorial administration, most notably the deployments by the United Nations in East Timor (United Nations Transitional Administration in East Timor, or UNTAET, 1999–2002) and Kosovo<sup>92</sup> (United Nations Interim Administration Mission in Kosovo/Kosovo Force, or UNMIK/KFOR, since 1999). This raises the question of the extent to which such deployments could give rise to situations of belligerent occupation under IHL, or whether the legal and policy framework governing such deployments should be shaped by elements of the law of occupation.

Neither UNTAET nor UNMIK/KFOR conforms neatly to the traditional concept of belligerent occupation, in particular because both were deployed with the consent of Indonesia and the Federal Republic of Yugoslavia respectively. Given that Belgrade's agreement to the deployment of UNMIK/KFOR was obtained only after a relentless aerial bombardment campaign, it is at least questionable whether the subsequent consent by the Yugoslav government can be regarded as genuine. Even coerced consent may be valid, however, as long as such coercion is legitimized by a Chapter VII resolution of the UN Security Council, which, arguably, was the case in the Kosovo war. Also, the international community is unlikely to start authorizing multinational deployments involving the invasion and belligerent occupation of territory without the consent of the territorial State. For the time being, therefore, the scenario of the law of occupation formally applying to a UN-mandated multinational deployment remains fairly hypothetical.

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91 UN Security Council Resolution 478 of 20 August 1980.

92 UN Security Council Resolution 1244.

Despite the formal inapplicability of the law of occupation, however, it is clear that both UNTAET and UNMIK/KFOR assumed full *de facto* governmental functions to the exclusion of the local authorities, and that both missions also exercised effective military control in the administered territories. In the absence of an international legal framework specifically designed for such situations, IHL governing belligerent occupation may provide useful elements and guidance for determining policies with respect to issues such as maintaining public safety, and law and order, ensuring the basic protection of persons and property, and taking charge of penal proceedings, internment and other matters of public administration. Thus, until a more complete legal and policy framework has been developed for multinational territorial administration, the law of occupation should, and will, certainly remain an important framework of reference for the translation of the underlying UN mandates into specific policies and regulations.<sup>93</sup>

#### To go further (Belligerent occupation)<sup>94</sup>

- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, [Chapter 8: The protection of civilians](#), pp. 231–248.
- Tristan Ferraro, “[Determining the beginning and end of an occupation under international humanitarian law](#),” *IRRC*, Vol. 94, No. 885, Spring 2012, pp. 133–163. See especially pp. 139 ff. on the notion of “effective control.”
- “[Occupation](#),” *IRRC*, Vol. 94, No. 885, Spring 2012.
- ICRC, [Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory](#), report prepared and edited by Tristan Ferraro, ICRC, Geneva, March 2012, 147 pp.
- ICRC, *Commentary on the First Geneva Convention*, 2nd ed., ICRC/Cambridge University Press, 2016, Article 2.

#### How Does Law Protect in War?

- Case No. 190, [Iraq, The End of Occupation](#)
- Case No. 236, [ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo](#), paras 173–178
- Case No. 291, [Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia](#), paras 19–23

<sup>93</sup> For a discussion on the relevance of occupation law for UN-administered territory, see ICRC, *Occupation and Other Forms of Administration*, *op. cit.* (note 80), pp. 78–87 and 96–104 (Appendix 2).

<sup>94</sup> All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

## V. NON-INTERNATIONAL ARMED CONFLICTS

The vast majority of contemporary armed conflicts are waged, not between States, but between States and organized armed groups or between such groups – they are non-international in character. Treaty IHL governing non-international armed conflicts consists, first and foremost, of common Article 3 and Additional Protocol II. A number of treaties on the regulation, prohibition or restriction of certain types of weapon also apply in non-international armed conflicts. Last but not least, owing to the relative scarcity of applicable treaty IHL, customary law is of great importance for the regulation of non-international armed conflicts. Treaty law distinguishes between non-international armed conflicts within the meaning of common Article 3 and non-international armed conflicts falling within the definition provided in Article 1 of Additional Protocol II.



T.A. Voeten/ICRC

Ganta, Liberia, on the border with Guinea, 2003. Members of government armed forces/militias in a pick-up truck.

### 1. Article 3 common to the 1949 Geneva Conventions

During the negotiations preceding the adoption of the 1949 Geneva Conventions, the proposal was made to extend the Conventions' applicability *in toto* to non-international armed conflicts.<sup>95</sup> It soon became clear, however, that States would agree to fully apply all four Conventions to non-international armed conflicts only at the price of a very narrow definition

<sup>95</sup> *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 120–129 and 325–339. See also ICRC, *Commentary on the First Geneva Convention*, 2nd ed., 2016, *op. cit.* (note 64), Art. 3.

of non-international armed conflict that was highly unlikely to be met in reality.<sup>96</sup> As a consequence, the applicability of IHL to non-international armed conflicts would probably have remained the exception instead of becoming the rule. It was therefore ultimately decided to limit the provisions applicable in non-international armed conflicts rather than the cases of non-international armed conflict to which IHL would apply.<sup>97</sup> Accordingly, common Article 3 simply identifies a number of key duties and prohibitions providing a minimum of protection to all persons who are not, or who are no longer, taking an active part in the hostilities. In return, this “miniature Convention”<sup>98</sup> must be applied “as a minimum” by each party to any “armed conflict not of an international character.”<sup>99</sup> Common Article 3 reads as follows:

“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

96 See *Final Record*, *op. cit.* (note 95), pp. 120–129 (summarized in ICRC, *Commentary on the First Geneva Convention*, 2nd ed., 2016, *op. cit.* (note 64), Art. 3).

97 ICRC, *Commentary on the First Geneva Convention*, 2nd ed., 2016, *op. cit.* (note 64), Art. 3.

98 Statement of the Soviet delegate to the Conference. See *Final Record*, *op. cit.* (note 95), p. 326.

99 GC I–IV, common Art. 3(1).

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”

A non-international armed conflict within the meaning of common Article 3 does not necessarily have to involve a government; it can also take place entirely between organized armed groups, a scenario that is particularly relevant in areas of weak governance, such as so-called “failed States.” In order for a non-State armed group to be considered a “party” to a conflict, common Article 3 does not require any recognition of belligerency by the opposing State, nor popular support, territorial control or political motivation. As will be shown, however, the concept of “party to an armed conflict” presupposes a minimum level of organization without which coordinated military operations and collective compliance with IHL would not be possible. Furthermore, in order to qualify as an “armed conflict,” non-international confrontations must always involve violence that reaches a certain threshold of intensity.

## 2. Article 1 of Additional Protocol II

Additional Protocol II, which was adopted in 1977, develops and supplements common Article 3. The Protocol does not modify the conditions of application of common Article 3, but defines its own scope of application more restrictively and, therefore, cannot serve as a generic definition of non-international armed conflict. Article 1 of the Protocol reads:

- “1. This Protocol (...) shall apply to all armed conflicts which are not [of international character] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”

Thus, in contrast to common Article 3, Additional Protocol II applies only to armed conflicts involving a contracting State as a party to the conflict and taking place in the territory of that State. Moreover, part of the State’s territory must be under the effective control of the opposition forces, thus

assimilating their role to that of a *de facto* authority with direct obligations not only towards the opposing party, but also towards the inhabitants of the territory under their control. The Protocol's high threshold of applicability is indicative of the continuing reluctance of governments to expand the international regulation of internal armed conflicts unless they develop into situations comparable to international armed conflicts in many ways.

For the present purposes, the decisive advantages of Article 1 of Additional Protocol II are, first, that it provides an objective threshold of factual criteria at which the existence of a non-international armed conflict can no longer be denied and, second, that it stipulates that situations of "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature," do not constitute armed conflicts.<sup>100</sup>

### 3. Threshold of organization

Without a minimum level of organization, it is impossible to conduct coordinated military operations and to ensure collective compliance with IHL. Therefore, minimal organization has always been considered a defining element of armed forces or organized armed groups participating in an armed conflict as opposed to participants in riots and other forms of unorganized large-scale violence.<sup>101</sup> While State armed forces are generally presumed to satisfy this criterion, the level of organization of non-State armed groups has in practice been assessed based on a series of indicative factors including elements such as: "the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords."<sup>102</sup>

### 4. Threshold of intensity

In relations between States, the general prohibition on the threat or use of force established by the UN Charter means that essentially any use of force between

<sup>100</sup> See also Rome Statute, Art. 8(2)(d) and (f).

<sup>101</sup> For references to the element of organization in treaty IHL governing both international and non-international armed conflicts, see in particular GC III, Art. 4(A)(2) ("organized resistance movements"), AP I, Art. 43(1) ("all organized armed forces, groups and units"), and AP II, Art. 1(1) ("other organized armed groups").

<sup>102</sup> ICTY, *The Prosecutor v. Ramush Haradinaj et al.*, Trial Chamber I (Judgment), Case No. IT-04-84-T, 3 April 2008, para. 60. See also ICRC, Opinion Paper, *op. cit.* (note 70), p. 3.

States gives rise to an international armed conflict. By contrast, the domestic use of force by State authorities against private individuals, or the use of force between such private individuals, generally remains a matter of law enforcement governed primarily by human rights law and national criminal law. In order for such a non-international confrontation to amount to armed conflict, it must be clearly distinguishable from internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature. Apart from a sufficient level of military organization of each party to the conflict, this also requires that the confrontation reach a threshold of intensity that cannot be addressed through routine peacetime policing, but which requires the intervention of armed forces.<sup>103</sup> Accordingly, in order for a non-international armed conflict to exist, the ICTY requires a situation of “protracted armed violence” between a State and organized armed groups or between such groups,<sup>104</sup> a criterion that in practice has been interpreted as referring more to the intensity of the armed violence than to its duration.<sup>105</sup> Indicative factors for assessing “intensity” have included: “the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.”<sup>106</sup>

In sum, given the diversity of situations involving non-international violence, their classification as armed conflict will always depend on a careful assessment of the concrete circumstances rather than on a uniform definition, particularly at the lower end of the scale of intensity. Nevertheless, the existence of a non-international armed conflict always remains a question of fact, and does not depend on political considerations of the parties involved. In practice, the ICRC’s confidential memoranda reminding the parties of their obligations under IHL can play an important role, as they generally also express a view as to the legal classification of the situation.<sup>107</sup> In contentious cases, however, legally binding classifications will generally have to be made by a court or quasi-judicial mechanism called on to adjudicate the question as a matter of international law.

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103 ICRC, Opinion Paper, *op. cit.* (note 70), p. 3.

104 ICTY, *The Prosecutor v. Dusko Tadić*, *op. cit.* (note 70), para. 70.

105 ICTY, *The Prosecutor v. Ramush Haradinaj et al.*, *op. cit.* (note 102), para. 49.

106 *Ibid.*

107 See Chapter 8.III.



## 5. Temporal and territorial scope of non-international armed conflicts

### (a) Temporal scope of non-international armed conflicts

In terms of temporal scope, non-international armed conflicts begin as soon as armed violence occurring between sufficiently organized parties reaches the required threshold of intensity. While these constitutive elements provide objective criteria for the identification of a situation of armed conflict, in political reality they are often interpreted with a certain latitude, particularly by the government involved. While, in some contexts, States refuse to recognize the applicability of IHL despite organized armed violence claiming thousands of victims every year, other confrontations are readily subjected to a legal paradigm of “war” although they appear to have more in common with law enforcement operations than with full-blown armed conflict.

Once a non-international armed conflict has been initiated, IHL applies until “a peaceful settlement is achieved.”<sup>108</sup> Here, too, various forms of settlement are conceivable, from formal peace agreements or declarations of surrender to the complete military defeat of either party or the gradual subsiding of armed violence until peace and public security have been firmly re-established. In practice, the end of a non-international armed conflict requires not only the end of active hostilities but also the end of related military operations of a belligerent nature in circumstances in which the likelihood of their resumption can reasonably be excluded.

### (b) Territorial scope of non-international armed conflicts

In terms of territorial scope, the applicability of both common Article 3 and Additional Protocol II is restricted to armed conflicts taking place “in the territory” of a High Contracting Party; the Protocol even requires that the territorial State be involved as a party to the conflict. The territorial requirement is rooted in the fact that both instruments introduced binding rules not only for the contracting States themselves, but also for non-State armed groups operating on their territory. The legislative authority to do so derives from, and is limited to, the territorial sovereignty of each contracting State. It is therefore only logical that both instruments incorporate a territorial link between the conflict and the contracting State.

Today, the territorial restriction of the scope of applicability of common Article 3 and Additional Protocol II no longer serves its original purpose. First, the four 1949 Geneva Conventions have been universally ratified, thus making the scenario of a non-international armed conflict occurring entirely

<sup>108</sup> ICTY, *The Prosecutor v. Dusko Tadić*, *op. cit.* (note 70), para. 70.

outside the territory of a contracting State highly unlikely.<sup>109</sup> Second, even if such an armed conflict were to occur, it would still be governed by the humanitarian provisions of common Article 3 by virtue of their recognition as customary law and an expression of a general principle of law (“elementary considerations of humanity”) and, thus, as universally binding irrespective of treaty obligations.<sup>110</sup> Third, whenever non-international armed conflicts involved extraterritorial incursions with the consent of the neighboring State, they were considered as part of the original non-international armed conflict.<sup>111</sup> Where such consent is absent, extraterritorial operations may provoke an international armed conflict with the territorial State. In this regard, there is a continuing controversy as to whether the newly triggered international armed conflict coexists with the original non-international armed conflict or whether it subsumes the latter, at least to the extent that it occurs on foreign territory.

If any conceptual restriction of non-international armed conflict to the territorial confines of one single State had existed in the minds of the drafters of common Article 3 and Additional Protocol II, it certainly remained unspoken and has been manifestly outlived by contemporary legal opinion and State practice. Even though the original aim of these provisions may have been to regulate armed conflicts occurring within the territorial confines of a State, the term “non-international” armed conflict today can no longer be regarded as synonymous with “internal” armed conflict.

At the same time, in situations of non-international armed conflict, not only does IHL apply in areas exposed to active hostilities, it governs essentially any act or operation carried out for reasons related to the conflict (nexus to the conflict), regardless of territorial location. This does not mean that military action against the enemy can lawfully be taken anytime and anywhere in the world (“global battlefield”). Rather, in order to be lawful, any extraterritorial military action must always comply not only with the rules and principles of IHL, but also with those of *jus ad bellum*, the law of neutrality and any other relevant bodies of international law. Ultimately, non-international armed conflicts are not characterized by their limited or unlimited territorial scope, but by the nature and quality of the parties involved, and by the actual occurrence of hostilities and other acts or operations having a belligerent nexus.

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109 ICRC, Opinion Paper, *op. cit.* (note 70), p. 3.

110 ICJ, *Nicaragua case*, *op. cit.* (note 27), para. 218. On general principles of law, see also Chapter 1.II.3.

111 See, for example, the interpretation by the United States government of the Ugandan conflict as a “civil conflict,” even though the insurgent “Lord’s Resistance Army (LRA), a terrorist organization (...) operated in the north from bases in southern Sudan,” in: US Department of State, *Country Reports on Human Rights Practices: Uganda*, 2001, available at: <http://www.state.gov/j/drl/rls/hrrpt/2001/af/8409.htm>

### To go further (Non-international armed conflicts)<sup>112</sup>

- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, [Chapter 12: The law of non-international armed conflicts](#), pp. 327–350.
- Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012.
- Jelena Pejic, “[The protective scope of common Article 3: More than meets the eye](#),” *IRRC*, Vol. 93, No. 881, March 2011, pp. 189–225.
- Sylvain Vité, “[Typology of armed conflicts in international humanitarian law: Legal concepts and actual situations](#),” *IRRC*, Vol. 91, No. 873, March 2009, pp. 69–94.
- ICTY, *The Prosecutor v. Fatmir Limaj et al.*, Trial Chamber II (Judgment), 30 November 2005, Case No. IT-03-66-T, paras 84 and 89–91.
- ICRC, *Commentary on the First Geneva Convention*, 2nd ed., ICRC/Cambridge University Press, 2016, Article 3.
- “Contemporary challenges for IHL,” webpage, ICRC. Available at: <https://www.icrc.org/en/war-and-law/contemporary-challenges-for-ihl>

### *How Does Law Protect in War?*

- Case No. 149, [Israel/Lebanon/Hezbollah Conflict in 2006](#)
- Case No. 211, [ICTY, The Prosecutor v. Tadić, Doc. A](#), paras 67–70, and [Doc. B](#), para. 562
- Case No. 220, [ICTY, The Prosecutor v. Boškoski](#), paras 175–178
- Case No. 234, [ICTR, The Prosecutor v. Jean-Paul Akayesu](#), paras 603 and 619–626

## VI. ARMED CONFLICTS SUBJECT TO FOREIGN INTERVENTION

Armed conflicts subject to foreign intervention are a special form of armed conflict sometimes also less accurately referred to as “internationalized” armed conflicts. In essence, this concept refers to a State, or coalition of States, intervening in a pre-existing non-international armed conflict, thereby becoming a (co-belligerent) party to that conflict.

112 All ICRC documents available at: [www.icrc.org](http://www.icrc.org)



J. Fontana

Bangladesh Institute of Peace Support Operation Training, simulation exercise, 2010.

In terms of applicable law, where a State intervenes in support of the territorial government's struggle against an insurgency, the relations between the insurgency and the intervening State, just like the pre-existing conflict, will be governed by IHL applicable to non-international armed conflicts. Where the intervening State supports the insurgency against the territorial State, however, the situation becomes more complex. The armed confrontations between the intervening State and the territorial State will automatically trigger the applicability of IHL governing international armed conflicts. The confrontations between the territorial State and the insurgency, on the other hand, will retain their non-international character and continue to be governed by IHL applicable to non-international armed conflicts. In terms of applicable law, this results in the coexistence of an international and a non-international armed conflict, a situation that is sometimes also referred to as "double classification." Finally, where an intervening State not only supports, but actually directs and controls the insurgent party to such an extent that its operations would have to be regarded as those of the intervening State itself, the pre-existing non-international armed conflict between the territorial State and an insurgency will be transformed into an international armed conflict between the territorial and the intervening States.<sup>113</sup>

113 For the basic positions concerning the degree of control required to make a State responsible for the conduct of an organized armed group, see in particular: ICJ, *Nicaragua case, op. cit.* (note 27), para. 115; ICTY, *The Prosecutor v. Dusko Tadić*, Appeals Chambers (Judgment), Case No. IT-94-A, 15 July 1999, para. 145; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 27 February 2007, para. 413.

As a general rule, the same principles of classification also apply to armed interventions by multinational forces mandated by the UN or a regional organization. It must be emphasized that the applicability of IHL to multinational forces depends on the same factual circumstances that apply to any other force, irrespective of their international mandate and designation, and irrespective also of the designation that may have been given to potential parties opposing such forces. The mandate and the legitimacy of a mission entrusted to multinational forces are issues of *jus ad bellum* and general international law, but are strictly irrelevant when it comes to the applicability of IHL to multinational operations. Therefore, where multinational forces remain under their national command, they continue to be bound by the international obligations of their State of origin. Where they operate under the direct command of the UN, they are additionally required to respect IHL by virtue of the UN Secretary-General's Bulletin on the observance by UN forces of international humanitarian law.<sup>114</sup> In the ICRC's view, in both cases, the resulting conflict should be regarded as being international in character in the event of hostilities between the multinational force and one or several other States, and non-international in character if hostilities are conducted against organized armed groups only.

### To go further (Armed conflicts subject to foreign intervention)<sup>115</sup>

- Sylvain Vité, "[Typology of armed conflicts in international humanitarian law: Legal concepts and actual situations](#)," *IRRC*, Vol. 91, No. 873, March 2009, pp. 87–88.
- "[Multinational operations and the law](#)," *IRRC*, Vol. 95, No. 891/892, 2013.
- International Law Commission, "[Draft articles on responsibility of states for internationally wrongful acts, with commentaries](#)," *Yearbook of the International Law Commission*, 2001, Vol. 2, Part 2, Article 8, commentary, para. 5.

### How Does Law Protect in War?

- Case No. 274, Case Study, [Armed Conflicts in Sierra Leone, Liberia and Guinea \(1980–2005\)](#)
- Case No. 229, [Democratic Republic of the Congo, Conflict in the Kivus](#)

<sup>114</sup> *United Nations Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, ST/SGB/1993/13, United Nations, New York, 6 August 1999.

<sup>115</sup> All ICRC documents available at: [www.icrc.org](http://www.icrc.org)



# Chapter 3

## The conduct of hostilities



Bangui, Central African Republic, 2013. Soldiers from the Democratic Republic of the Congo on patrol with the Central African Multinational Force.

## Structure

- I. Protection of the civilian population
- II. Protection of civilian objects, and of certain areas and institutions
- III. Proportionality, precautions and presumptions
- IV. Methods of warfare
- V. Means of warfare
- VI. Specific issues arising in non-international armed conflicts

### In a nutshell

- In all armed conflicts, the right of the belligerent parties to choose methods or means of warfare is not unlimited.
- Belligerent parties must at all times distinguish between the civilian population and combatants, and between civilian objects and military objectives, and must direct their operations only against military objectives.
- Individual civilians enjoy protection against attack unless and for such time as they directly participate in hostilities.
- The principle of distinction also entails a duty to prevent erroneous targeting and to avoid or, in any event, minimize the infliction of incidental death, injury or destruction on civilians and civilian objects.
- With regard to any new weapon, means or method of warfare, States must determine whether its employment would, in some or all circumstances, be prohibited by international law, most notably whether it would have indiscriminate effects, cause unnecessary suffering or superfluous injury, or widespread, long-term and severe damage to the environment, or otherwise be incompatible with the principles of international law as derived from established custom, the principles of humanity or the dictates of public conscience.



**To go further<sup>116</sup>**

- ICRC e-learning module, *The basic principles of international humanitarian law*. Available at: <http://www.icrcproject.org/elearning/en/ihl/M5/index.html>
- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, [Chapter 9: Conduct of hostilities](#), pp. 249–294.
- Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, 2010.
- “Conduct of Hostilities,” webpage, ICRC. Available at: <https://www.icrc.org/en/war-and-law/conduct-hostilities>

***How Does Law Protect in War?***

- Case No. 124, [Israel/Gaza, Operation Cast Lead](#)

Throughout the history of warfare, the conduct of hostilities has inflicted unspeakable suffering on millions of families and individuals. This remains the case today. Civilians and combatants alike are killed, wounded or maimed for life, and often lose loved ones or their property and belongings. Landmines, cluster munitions and other unexploded ordnance render entire regions uninhabitable for years and sometimes decades. Villages, cities and individual dwellings are destroyed, cultural property and religious sites damaged, and power plants, bridges and other critical infrastructure rendered useless, forcing entire populations to flee their homes, with enormous humanitarian consequences. It has long been a central objective of IHL, therefore, to prohibit unrestricted warfare and to regulate the conduct of hostilities so as to mitigate, as much as possible, the “calamities of war.”<sup>117</sup>

The three most fundamental maxims of IHL relevant to the conduct of hostilities are as follows: (1) “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”,<sup>118</sup> (2) in pursuing this aim, “the right of the Parties to the conflict to choose methods or means of warfare is not unlimited”,<sup>119</sup> and (3) “[t]he civilian population and individual civilians shall enjoy general protection

116 All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

117 St Petersburg Declaration.

118 *Ibid.*

119 AP I, Art. 35(1). See also Hague Regulations, Art. 22.



B. Stirton/Getty Images/ICRC

Barrio Chuijo, west of Chimoio, Mozambique, close to the border with Zimbabwe, 2013. A survivor of a landmine explosion works the land.

against dangers arising from military operations.”<sup>120</sup> Therefore, IHL regulating the conduct of hostilities can be said to pursue two basic goals: first, to ensure the protection of the civilian population and civilian objects from the effects of the hostilities, and second, to impose constraints on certain methods and means of warfare.

## I. PROTECTION OF THE CIVILIAN POPULATION

The undisputed cornerstone of IHL aiming to protect the civilian population from the effects of hostilities is the principle of distinction, according to which parties to an armed conflict must “at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”<sup>121</sup> The protective purpose of the principle of distinction can be achieved only if the underlying categories of person (“civilians” and “combatants”) and objects (“civilian objects” and “military objectives”) are defined, and if the scope and conditions of the protection afforded to civilians and civilian objects are clear.

<sup>120</sup> AP I, Art. 51(1).

<sup>121</sup> AP I, Art. 48; CIHL, Rules 1 and 7.

## 1. Definition of "combatants"

In a generic sense, combatants are members of the fighting forces of the belligerent parties. In principle, therefore, all members of the armed forces of a party to an international armed conflict are combatants, except medical and religious personnel assuming exclusively humanitarian functions.<sup>122</sup> The only weapon-bearers who may be regarded as combatants without being members of the armed forces are participants in a *levée en masse*.<sup>123</sup> Persons fighting outside these categories, such as mercenaries<sup>124</sup> or civilians taking a direct part in hostilities,<sup>125</sup> are not entitled to combatant status.

- On the special protection afforded to medical and religious personnel, see Chapter 4.II.
- On the special protection afforded to members of the armed forces exclusively assigned to civil defence duties, see Section II.4. below.

### (a) Members of the armed forces

The armed forces of a party to a conflict comprise "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates."<sup>126</sup> This broad and functional concept of armed forces has evolved since the adoption of the Hague Regulations, which already recognized that the "laws, rights, and duties of war" applied not only to the regular armed forces, but also to irregular militia and volunteer corps, provided that they fulfilled four conditions assimilating them to regular armed forces: (1) they were commanded by a person responsible for his subordinates; (2) they had a fixed distinctive emblem recognizable at a distance; (3) they carried arms openly; and (4) they conducted their operations in accordance with the laws and customs of war.<sup>127</sup> The requirements of visible distinction from the civilian population and respect for IHL are no longer considered to be constitutive elements of the armed forces *per se*, but have become individual obligations, the violation of which may entail consequences for the individual combatant, most notably loss of the privilege of combatancy and prisoner-of-war status (non-compliance with the visibility requirement)<sup>128</sup> or

122 AP I, Art. 43(2); CIHL, Rule 3.

123 Hague Regulations, Art. 2; see also Section I.1.b.

124 AP I, Art. 47(1).

125 AP I, Art. 51(3).

126 AP I, Art. 43(1); CIHL, Rule 4.

127 Hague Regulations, Art. 1.

128 AP I, Arts 44(3) and 46; CIHL, Rules 106 and 107.

prosecution (violations of IHL).<sup>129</sup> In sum, today, all armed forces, groups or units showing a sufficient degree of military organization and belonging to a party to a conflict must be regarded as part of the armed forces of that party.<sup>130</sup>

Individual membership in the regular armed forces of States is generally regulated by domestic law and expressed through formal integration into permanent units distinguishable by uniforms, insignia and equipment. The same applies where armed units of police officers, border guards, or similar uniformed forces are incorporated in State armed forces. For the purposes of the principle of distinction, membership in regular State armed forces ceases, and civilian status and protection are restored, when a member disengages from active duty and returns to civilian life, whether after being discharged from duty or as a deactivated reservist. Membership in irregularly constituted armed forces, such as militias, volunteer corps, or organized resistance movements belonging to a belligerent party, generally is not regulated by domestic law and can be reliably determined only on the basis of functional criteria, such as those applying to non-State armed groups in non-international armed conflicts (“continuous combat function”).<sup>131</sup>

→ On membership of non-State armed groups in non-international armed conflicts, see Section VI.2 below.

### (b) Participants in a *levée en masse*

In IHL, the term *levée en masse* is used to describe the inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.<sup>132</sup> As soon as a *levée en masse* becomes continuous and organized, it is no longer regarded as such, but as an organized resistance movement. Participants in a *levée en masse* are the only armed actors regarded as combatants even though, by definition, they operate spontaneously and lack sufficient organization and command to qualify as members of the armed forces. All other persons who take a

129 J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, *op. cit.* (note 23), pp. 15–16.

130 N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, p. 22.

131 N. Melzer, *Interpretive Guidance*, *op. cit.* (note 130), p. 25.

132 Hague Regulations, Art. 2; GC III, Art. 4(A)(6). See also the reference to GC III, Art. 4(A)(6) in AP I, Art. 50(1).

direct part in hostilities on a merely spontaneous, sporadic or unorganized basis must be regarded as civilians.<sup>133</sup>

By definition, individual involvement in a *levée en masse* is based on spontaneous and unorganized “participation” in hostilities, and not on “membership,” which would imply a minimum of continuity and organization. It therefore follows that participants in a *levée en masse* have combatant status based on their immediate conduct, and that their loss of protection against direct attack must be determined based on the same criteria that apply to civilians directly participating in hostilities. Both categories of person participate in hostilities on a merely spontaneous and unorganized basis, albeit with different consequences as far as their entitlement to the privilege of combatancy and prisoner-of-war status is concerned.

- On direct participation in hostilities by civilians, see Section I.4. below.
- On prisoner-of-war status, see Chapter 5.I.2.

#### (c) **Combatant status and combatant’s privilege**

For the purposes of the principle of distinction, the most important consequence associated with combatant status is the loss of civilian status and of protection against direct attack. Moreover, combatant status entails the “combatant’s privilege,” namely “the right to participate directly in hostilities” on behalf of a party to an international armed conflict.<sup>134</sup> The combatant’s privilege as such has no immediate consequences in terms of the principle of distinction but is of greater relevance for the status and rights afforded to an individual after capture by the enemy. Combatant status and combatant’s privilege are exclusive to situations of international armed conflict and are not provided for in IHL governing non-international armed conflicts.

- On the relevance of combatant’s privilege in the context of detention, see Chapter 5.I.1.

#### (d) **“Unprivileged” or “unlawful” combatants**

Not everyone taking up arms in an international armed conflict necessarily qualifies for the privilege of combatancy. Members of the armed forces may lose that privilege for failing to distinguish themselves from the civilian

<sup>133</sup> N. Melzer, *Interpretive Guidance*, *op. cit.* (note 130), p. 25.

<sup>134</sup> API, Art. 43(2).

population. Others – mercenaries,<sup>135</sup> private contractors,<sup>136</sup> civilian intelligence agents, organized criminals, other civilians – may directly participate in hostilities without being entitled to the privilege in the first place. Civilians directly participating in hostilities and others supporting the enemy's war effort without being entitled to the privilege of combatancy are sometimes sweepingly described as “unprivileged” or “unlawful” combatants and wrongly said to fall outside the categories of person protected by the 1949 Geneva Conventions.

→ For more information on the concepts of “unprivileged” or “unlawful” combatants in the context of detention, see Chapter 5.I.1.b.

For the purposes of the conduct of hostilities, the composite terms “unprivileged combatant” and “unlawful combatant” are often used far too sweepingly, generally in order to imply that the persons concerned do not have the privilege of combatancy and are not protected against direct attack. It must be emphasized, however, that neither “unprivileged” nor “unlawful” combatant is a term used in IHL, and that neither entails any status or loss of protection in derogation of the categories and rules already foreseen in IHL. This observation is equally valid for situations of international and non-international armed conflict. As a matter of law, therefore, a person's loss of protection against direct attack can never be the result of his or her informal categorization as an “unprivileged” or “unlawful” combatant, but must always be based on his or her membership in the armed forces of a belligerent party (combatant status – see Section I.1.c above) or, in the case of civilians, his or her direct participation in hostilities (direct participation in hostilities – see Section I.4 below) within the meaning of IHL. While the term “unprivileged combatant” arguably may be used in a purely descriptive manner for members of the armed forces who have lost their entitlement to the privilege of combatancy, it should never be used to refer to persons who are protected against direct attack, or who may only lose such protection on a temporary basis, such as civilians directly participating in hostilities and others supporting the enemy without becoming part of its fighting forces. As to the notion of “unlawful combatant,” the fact that IHL limits the “right” to directly participate in hostilities to privileged combatants does not necessarily imply a prohibition of “unprivileged combatancy” as a matter of IHL. Strictly speaking, IHL does not prohibit anyone from taking up arms in a situation of armed conflict; it simply requires that all those doing so comply with its rules on the conduct of hostilities.

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135 AP I, Art. 47; CIHL, Rule 109.

136 GC III, Art. 4(4) and (5).

Given that the use of terms such as “unprivileged combatant” or “unlawful combatant” in the context of the conduct of hostilities is fraught with considerable risk of abuse or misunderstanding, the term “combatant” will be used below in its technical meaning only, namely as referring to persons entitled to the privilege of combatancy in situations of international armed conflict.

## 2. Definition of “civilians” and “civilian population”

In IHL, the civilian population is negatively defined as comprising all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse*.<sup>137</sup> Thus, the definition also includes civilians accompanying the armed forces without being incorporated therein, such as war correspondents and, as a general rule, private contractors and civilian intelligence or law enforcement personnel, even if some of them may be entitled to prisoner-of-war status upon capture.<sup>138</sup> On the other hand, as has been shown, all armed forces, groups and units showing a sufficient degree of military organization and operating *de facto* on behalf of and with the agreement of a party to the conflict must be regarded as part of its armed forces and therefore do not qualify as civilians, irrespective of their entitlement to prisoner-of-war status or the combatant’s privilege, and regardless of their denomination in domestic law.<sup>139</sup> If there is any doubt about a person’s civilian status, that person must be considered a civilian.<sup>140</sup>

## 3. Specific prohibitions

### (a) Direct attacks

The most direct emanation of the principle of distinction is, of course, the prohibition of direct attacks against civilians.<sup>141</sup> It is important to note that, in IHL, the word “attacks” refers not only to offensive operations, but includes all “acts of violence against the adversary, whether in offence or in defence.”<sup>142</sup>

### (b) Acts of terror

While it is clear that any military operation affecting civilians is likely to induce a certain amount of fear and anxiety among the civilian population, IHL prohibits acts or threats of violence the primary purpose of which is to spread terror among the civilian population.<sup>143</sup>

137 AP I, Art. 50(1) and (2); CIHL, Rule 5.

138 See Chapter 5.I.2.

139 See Section I.I.a.

140 AP I, Art. 50(1).

141 AP I, Art 51(2); CIHL, Rule 1.

142 AP I, Art. 49(1).

143 AP I, Art. 51(2); CIHL, Rule 2.

### (c) Indiscriminate attacks

Apart from direct attacks against civilians, IHL also prohibits indiscriminate attacks. These are attacks which are of a nature to strike military objectives and civilians and civilian objects without distinction, either because they are not or cannot be directed at a specific military objective or because their effects cannot be limited as required by IHL.<sup>144</sup> Particularly devastating examples of indiscriminate attacks are the so-called “carpet bombing” campaigns of World War II, in which entire areas containing both military objectives and civilians and civilian objects were treated as a single military objective and attacked without distinction. Another example of indiscriminate attacks are those which may be expected to cause incidental harm to civilians or civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated.<sup>145</sup>

### (d) Human shields

IHL also prohibits belligerent parties from using civilians as “human shields.” Accordingly, it is prohibited to use the presence or direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attack, or to shield, favour or impede military operations.<sup>146</sup> However, even unlawful recourse to human shields by the defending party does not release the attacking party from its obligations under IHL, especially the principles of proportionality and precaution in attack.<sup>147</sup>

### (e) Non-reciprocity and prohibition of attacks by way of reprisal

All of the above-mentioned prohibitions are non-reciprocal in that their violation by the enemy does not release belligerent parties from their own obligations with respect to the civilian population.<sup>148</sup> In particular, it is prohibited to attack civilians by way of reprisal.<sup>149</sup>

## 4. Civilian participation in hostilities

### (a) Basic rule

In situations of armed conflict, civilians are entitled to protection against direct attack “unless and for such time as they take a direct part in hostilities.”<sup>150</sup> In other words, for the duration of their direct participation in hostilities, civilians may be directly attacked as if they were combatants. Despite the serious legal consequences involved, IHL provides no definition

144 AP I, Art. 51(4) and (5); CIHL, Rules 11–13.

145 AP I, Art. 51(5)(b). See also Section III.1. on the principle of proportionality.

146 AP I, Art. 51(7); CIHL, Rule 97.

147 See Section III.

148 AP I, Art. 51(8); CIHL, Rule 140.

149 GC IV, Arts 28 and 33; AP I, Art. 51(6); CIHL, Rules 145 and 146.

150 AP I, Art. 51(3); CIHL, Rule 6.



of conduct that amounts to direct participation in hostilities, nor can a clear interpretation of the concept be derived from State practice or international jurisprudence or from legal and military doctrine. The ICRC therefore conducted an informal expert process from 2003 to 2009, which resulted in the publication of its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*.

→ See Textbox 5, Chapter 3.I.4.c. below: *ICRC process to clarify the concept of “direct participation in hostilities.”*

### **(b) Meaning of “direct participation in hostilities”**

In essence, the concept of direct participation in hostilities comprises two basic components: that of “hostilities” and that of “direct participation” therein. While the concept of “hostilities” refers to the collective recourse by belligerent parties to means and methods of warfare, “participation” in hostilities refers to the individual involvement of a person in these hostilities. Depending on the quality and degree of such involvement, individual participation in hostilities may be described as “direct” or “indirect.” While *direct* participation refers to specific hostile acts carried out as part of the conduct of hostilities between parties to an armed conflict and leads to loss of protection against direct attack, *indirect* participation may contribute to the general war effort, but does not directly harm the enemy and therefore does not entail loss of protection against direct attacks.

In order to qualify as direct participation in hostilities, a specific act must meet all the following requirements: first, the harm likely to result from the act must be either specifically military in nature or involve death, injury or destruction (threshold of harm); second, there must be a direct causal relation between the act and the expected harm (direct causation); third, the act must be an integral part of the hostilities occurring between parties to an armed conflict and must, therefore, aim to support one belligerent party to the detriment of another (belligerent nexus). In short, the concept of direct participation in hostilities should be interpreted as referring to acts designed to support a belligerent party by directly harming its enemy, either by directly causing military harm or by directly inflicting death, injury or destruction on persons or objects protected against direct attack. These criteria permit a reliable distinction to be made between activities amounting to direct participation in hostilities and activities that, although occurring in the context of an armed conflict, are not part of the conduct of hostilities between belligerent parties and therefore do not entail loss of protection against direct attack within the meaning of IHL.<sup>151</sup>

<sup>151</sup> See N. Melzer, *Interpretive Guidance*, *op. cit.* (note 130). For an expert critique of the ICRC’s interpretive guidance and the organization’s official response, see “Forum on

Finally, loss of protection against direct attack (due to direct participation in hostilities) must not be confused with loss of the special protection afforded to medical and religious personnel, and to civil defence personnel (due to the commission of acts harmful to the enemy).

- On the criteria for loss of the special protection afforded to medical and religious personnel, see Chapter 4, Sections II.2.a. and III.1.c. below.
- On the criteria for loss of the special protection afforded to civil defence personnel, see Section II.4. below.

**(c) Distinction from “unprivileged combatancy”**

The legal term “civilian direct participation in hostilities” should not be confused with the controversial notion of “unprivileged combatancy,” which has no meaning under IHL. As far as the categories of person recognized under IHL are concerned, both civilians directly participating in hostilities and members of the armed forces not entitled to the combatant privilege may be lawfully attacked, and both may also be prosecuted for lawful acts of war that constitute an offence under the applicable national law. However, the decisive difference between these two categories of person is that civilians directly participate in hostilities on a merely spontaneous, sporadic or unorganized basis, whereas “unprivileged” members of the armed forces do so on an organized and continuous basis. Therefore, civilians directly participating in hostilities lose their protection against direct attack only for the duration of each specific hostile act, whereas, in principle, both privileged and unprivileged members of the armed forces may be directly attacked for the entire duration of their membership, with the sole exception of those who are *hors de combat*.

- On “unprivileged combatancy,” see Section I.1.d. above and Chapter 5.I.1.b.

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‘Direct Participation in Hostilities,’ *New York University Journal of International Law and Politics*, Vol. 42, No. 3, Spring 2010, pp. 637–916.

### **Textbox 5: ICRC process to clarify the concept of “direct participation in hostilities”**

In 2003, the ICRC initiated an informal expert process with the aim of clarifying IHL as it relates to the concept of direct participation in hostilities. Five expert meetings were held in The Hague and in Geneva between 2003 and 2008. Each meeting brought together 40 to 50 legal experts from military, governmental and academic circles, and from international and non-governmental organizations, all of whom attended in their personal capacity. The process focused on interpreting the concept of direct participation in hostilities for the purposes of the conduct of hostilities only and did not address the legal regime applicable in the event of capture or detention of persons who have directly participated in hostilities. Also, the process examined the above-mentioned questions exclusively from the point of view of IHL; its conclusions remain without prejudice to an analysis of the questions raised by civilian participation in hostilities under other applicable branches of international law, such as human rights law or the UN Charter (*jus ad bellum*). Based on the discussions held and the research conducted in the course of the expert process, the ICRC published its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009). This document does not necessarily reflect the unanimous or majority opinion of the participating experts on the questions addressed; instead, it provides the ICRC’s official recommendations as to how IHL relating to the concept of direct participation in hostilities should be interpreted in the light of the circumstances prevailing in contemporary armed conflicts. It does not endeavour to change or amend existing IHL rules; it attempts instead to ensure their coherent interpretation in line with the core principles underlying IHL as a whole. While the *Interpretive Guidance* is not legally binding, the ICRC has expressed the hope that the careful and balanced analysis underlying its recommendations will be equally persuasive to States, non-State actors, military and humanitarian personnel, judicial officials and academics.

- See Nils Melzer, [\*Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law\*](#), ICRC, Geneva, 2009, 85 pp.

#### **(d) Interplay between the conduct of hostilities and the law enforcement paradigms**

The fact that civilian support for the enemy does not amount to direct participation in hostilities does not mean that such support is necessarily lawful, or that no measures can be taken to prevent, suppress or punish such support. Given that the civilians concerned remain protected against direct attack, any use of force against them must comply with the more restrictive rules of the law enforcement paradigm. This distinction is crucial because, contrary to the more permissive rules on the conduct of hostilities, the law enforcement paradigm allows the use of lethal force only in order to protect human life

from an unlawful attack, and only as a last resort when other available means remain ineffective or without any promise of achieving the intended result. Moreover, the conduct of hostilities paradigm tolerates more incidental harm than the law enforcement paradigm. The two paradigms also contain different requirements in terms of operational planning and of the duty to investigate violations. In January 2012, the ICRC organized an expert meeting to clarify this issue, which will likely be further explored in the years to come.

- For more information on the applicable paradigm, see Textbox 2: ICRC expert meeting on IHL and the use of force in armed conflicts (Chapter 1.III.2.).
- On fundamental guarantees and security measures, see Chapter 6.I.3.

### To go further (Protection of the civilian population)<sup>152</sup>

- ICRC e-learning modules, *Protected persons and objects*. Available at: <http://www.icrcproject.org/elearning/en/ihl/M6/index.html>
- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, [Chapter 9: Conduct of Hostilities](#), pp. 250–280.
- Charles H.B. Garraway, “Combatants: Substance or semantics?,” in Michael Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines, Essays in Honour of Yoram Dinstein*, Martinus Nijhoff Publishers, Leiden/Boston, 2007, pp. 317–335.
- Knut Dörmann, “[The legal situation of ‘unlawful/unprivileged combatants’](#),” *IRRC*, Vol. 85, No. 849, March 2003, pp. 45–74.
- Stéphanie Bouchié de Belle, “[Chained to cannons or wearing targets on their T-shirts: Human shields in international humanitarian law](#),” *IRRC*, Vol. 90, No. 872, December 2008, pp. 883–906.
- Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, 85 pp.
- ICRC, *Professional Standards for Protection Work Carried Out by Humanitarian and Human Rights Actors in Armed Conflict and Other Situations of Violence*, ICRC, Geneva, 2013, 115 pp.

<sup>152</sup> All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

### *How Does Law Protect in War?*

- Case No. 20, [The Issue of Mercenaries](#)
- Case No. 126, [Israel, Military Prosecutor v. Kassem and Others](#)
- Case No. 164, [Sudan, Report of the UN Commission of Enquiry on Darfur](#)



H. Vanesian/ICRC

Old city of Aleppo, Syria, 2013. Destroyed houses just metres from the frontline.

## II. PROTECTION OF CIVILIAN OBJECTS, AND OF CERTAIN AREAS AND INSTITUTIONS

### 1. Military objectives and civilian objects

IHL provides that attacks must be strictly limited to military objectives and that civilian objects may not be the object of attacks or reprisals.<sup>153</sup> Civilian objects are negatively defined as all objects that are not military objectives.<sup>154</sup> Military objectives, in turn, are defined as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”<sup>155</sup> If there is any doubt whether an object normally used for civilian purposes,

<sup>153</sup> GC IV, Art. 33; AP I, Art. 52(1) and (2); CIHL, Rule 7.

<sup>154</sup> AP I, Art. 52(1); CIHL, Rule 9.

<sup>155</sup> AP I, Art. 52(2); CIHL, Rule 8.

such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it is presumed not to be so used.<sup>156</sup>

**(a) General meaning of “military objective”**

In order to qualify as a military objective, an object must meet two criteria. First, it must contribute effectively to the adversary’s military action (as opposed to mere policy objectives or the war-sustaining capabilities of the enemy), and it has to do so by its “nature” (e.g. the intrinsically military characteristics of weaponry), “location” (e.g. a physical obstacle impeding military operations), “purpose” (e.g. the intended future use of an ammunition factory under construction), or current “use” (e.g. a building being used as a sniper position). Second, an object making an effective contribution to the enemy’s military action can qualify as a military objective only if its destruction, capture or neutralization also offers the attacker a definite military advantage. It follows from the word “definite” that the advantage must be concrete and perceptible, and not merely hypothetical or speculative. The definition also stipulates that targeting decisions cannot be based on outdated assessments of past or speculations as to future developments; instead, any attack being contemplated must offer a definite military advantage “in the circumstances ruling at the time.” Thus, military objectives defined as such because of their use regain civilian status as soon as they no longer make an effective contribution to the enemy’s military action or an attack against them no longer offers a definite military advantage. As long as reference is made to a distinct tactical military operation rather than an entire military campaign, however, it is sufficient if such military advantage may be expected to result from the attack considered as a whole, and not necessarily from each act of violence that is part of that attack. While the precise meaning of the terms “effective contribution” and “definite advantage” depend heavily on contextual factors, it is clear that they both aim to avoid excessively permissive targeting criteria in operational practice.

**(b) Dual-use objects**

In practice, almost any civilian object can be used for military purposes and can therefore be a military objective for the duration of such use. Objects simultaneously used for civilian and military purposes are particularly problematic. Typical examples of objects that might become “dual-use” objects are logistical infrastructure (roads, bridges, railways, ports and airports), power plants, and electricity and communication networks. To the extent that a specific dual-use object makes an “effective contribution” to the enemy’s military action and its destruction, neutralization or capture offers a definite military advantage, it qualifies as a military objective regardless of its

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156 AP I, Art. 52(3).

simultaneous civilian use. The negative impact that an attack against a dual-use object is expected to have on the civilian population is not relevant for its categorization as a military objective, but must be taken into account in the proportionality assessment.<sup>157</sup> Accordingly, an attack against a dual-use object qualifying as a military objective would be unlawful if it may be expected to cause incidental civilian harm that would be excessive in relation to the concrete and direct military advantage anticipated.<sup>158</sup>

## 2. Specially protected objects

### (a) Cultural property

The conduct of hostilities has often resulted in the destruction of irreplaceable cultural property, particularly during the large-scale aerial bombardments of World War II. Recognizing the significance of this loss to the cultural heritage of humanity, the international community adopted the 1954 Hague Convention on Cultural Property and its two Protocols of 1954 and 1999. Additional Protocols I and II also contain provisions protecting cultural property.<sup>159</sup> In IHL, cultural property is defined as comprising essentially any secular or religious movable or immovable property of great importance to the cultural heritage of all people, such as monuments of architecture or history, archaeological sites, works of art, books, museums, and libraries and other buildings containing cultural property.<sup>160</sup>

In order to facilitate its identification, cultural property protected under IHL should be marked with the emblem of the 1954 Convention, a downward pointed blue square shield on a white background.<sup>161</sup> Such marking is purely indicative in nature and is not a precondition for the special protection afforded by IHL.<sup>162</sup> Belligerent parties must safeguard their own cultural property against the foreseeable effects of an armed conflict,<sup>163</sup> and they must respect all cultural property, whether their own or that situated in the territory of other States. In particular, they may not direct any act of hostility against cultural property, and must refrain from using such property for purposes likely to expose it to destruction or damage in the event of an armed conflict.<sup>164</sup> These obligations can be derogated from only in cases of imperative military necessity and if there is no feasible alternative available

157 The proportionality assessment is examined in Section III.

158 See Section III.2.b.

159 AP I, Arts 38, 53 and 85; AP II, Art. 16.

160 Hague Convention on Cultural Property, Art. 1.

161 Hague Convention on Cultural Property, Arts 16 and 17.

162 Hague Convention on Cultural Property, Arts 2 and 4.

163 Hague Convention on Cultural Property, Art. 3.

164 Hague Convention on Cultural Property, Art. 4(1).



to obtain a similar military advantage.<sup>165</sup> In no case, however, may cultural property be attacked unless it has, by its function, been turned into a military objective. Moreover, any such attack must be ordered by a commanding officer and, whenever circumstances permit, preceded by an effective advance warning.<sup>166</sup>

After the limited success of this system of “special protection” under the Hague Convention on Cultural Property, a second Protocol was adopted in 1999 that introduced a new system of “enhanced protection” for cultural property that: (1) represents cultural heritage of the greatest importance to humanity; (2) enjoys the highest level of protection in domestic law; (3) is not used for military purposes or to shield military sites and has been formally declared not to be intended for such use.<sup>167</sup> Belligerent parties controlling property granted enhanced protection must not use such property or its immediate surroundings in support of military action under any circumstances.<sup>168</sup> Even when such property has, by virtue of its use, become a military objective, it may not be attacked unless that is the only feasible means of terminating such use and unless precautions are taken to minimize damage to the property. Effective advance warning must be given, circumstances permitting.<sup>169</sup> The Hague Convention on Cultural Property and its Second Protocol also require States to criminalize in their domestic law a number of violations of IHL relating to the protection of cultural property.<sup>170</sup> Today, the protection of cultural property is regarded as part of customary IHL.<sup>171</sup>

**(b) Works and installations containing dangerous forces**

Certain installations, namely dams, dykes and nuclear power stations, are specially protected from attack because their partial or total destruction would likely have catastrophic humanitarian consequences for the surrounding civilian population and objects. As long as such works and installations constitute civilian objects they are, of course, protected against direct attack. However, even dams, dykes and nuclear power stations that qualify as military objectives, as well as other military objectives located in their vicinity, must not be attacked if such attack can cause the release of dangerous forces and consequent severe losses among the civilian population.<sup>172</sup>

165 Hague Convention on Cultural Property, Art. 4(2); AP I, Art. 57(3).

166 Hague Convention on Cultural Property, Art. 4, and its Second Protocol, Art. 6.

167 Second Protocol to the Hague Convention on Cultural Property, Art. 10.

168 Second Protocol to the Hague Convention on Cultural Property, Art. 12.

169 Second Protocol to the Hague Convention on Cultural Property, Art. 13.

170 Hague Convention on Cultural Property, Art. 28, and its Second Protocol, Art. 15.

171 CIHL, Rules 38–41.

172 AP I, Art. 56(1). See also CIHL, Rule 42.



This special protection against attack ceases only if the military objective in question is used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.<sup>173</sup> In no case may such works, installations or military objectives be made the object of reprisals.<sup>174</sup> If special protection ceases and any such works, installations or neighbouring military objectives are attacked, in addition to the precautionary measures required by the general rules on the conduct of hostilities, all practical precautions must be taken to avoid the release of the dangerous forces.<sup>175</sup>

In order to facilitate their identification, such objects should be marked with a special sign consisting of a group of three bright orange circles placed on the same axis.<sup>176</sup> Such marking is purely indicative in nature and is not a precondition for the special protection afforded by IHL.<sup>177</sup>

### **(c) Objects indispensable to the survival of the civilian population**

IHL prohibits the starvation of civilians as a method of warfare.<sup>178</sup> It is therefore prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population (e.g. foodstuffs, agricultural areas, crops, livestock, drinking water and irrigation systems) for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse party, whether in order to starve out civilians, to cause them to move away, or for any other motive.<sup>179</sup>

These prohibitions do not apply where such objects are used exclusively as sustenance for the opposing armed forces, or otherwise in direct support of military action,<sup>180</sup> unless action taken against them may be expected to starve the civilian population or force its movement. In no case may objects indispensable to the survival of the civilian population be made the object of reprisals.<sup>181</sup> A belligerent party may derogate from these prohibitions only where required by imperative military necessity for the defence of its national territory against invasion, and only within territory under its own control.<sup>182</sup>

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173 AP I, Art. 56(2).

174 AP I, Art. 56(4); CIHL, Rule 147.

175 AP I, Art. 56(3).

176 AP I, Annex I, Art. 16.

177 AP I, Art. 56(7).

178 AP I, Art. 54(1); CIHL, Rule 53.

179 AP I, Art. 54(2); CIHL, Rule 54.

180 AP I, Art. 54(3).

181 AP I, Art. 54(4); CIHL, Rule 147.

182 AP I, Art. 54(5).

The prohibition of starvation as a method of warfare does not prohibit sieges, naval blockades and embargoes that cause starvation as long as the purpose is to achieve a military objective and not to starve a civilian population. At the same time, the prohibition of starvation implies that the besieging party must either allow the inhabitants to leave the area in question or permit the free passage of humanitarian relief supplies.

**(d) Natural environment**

From a more general and long-term perspective, no civilian population can be adequately protected against the effects of war if the natural environment it depends on for its sustenance is destroyed, poisoned or severely damaged by military operations. Article 35 of Additional Protocol I therefore includes protection of the natural environment as a basic rule of IHL. As a general rule, the natural environment benefits from the protection afforded to civilian objects unless it meets all the constitutive requirements of a military objective.<sup>183</sup> In addition, IHL obliges belligerent parties to protect the natural environment against “widespread, long-term and severe damage,” and prohibits the use of methods or means of warfare that are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.<sup>184</sup> IHL also prohibits attacks against the natural environment by way of reprisals.<sup>185</sup>

While environmental damage that does not reach the threshold of “widespread, long-term and severe damage” remains subject to the general rules of distinction, proportionality and precaution, the prohibition of “widespread, long-term and severe damage” is absolute. In other words, if military operations are intended or may be expected to cause environmental damage that reaches that threshold, they are prohibited irrespective of whether the affected part of the environment qualifies as a military objective or, if not, whether the incidental harm inflicted on it would be excessive in relation to the anticipated military advantage. This is why the prohibition has such a high threshold. These three elements – “widespread,” “long-term” and “severe” – are understood to be cumulative, and “long-term” is understood to refer to decades.<sup>186</sup> However, as it may be difficult to estimate in advance the exact scope and duration of environmentally damaging military operations, belligerents should endeavour to limit environmental damage as far as possible even when it is not expected to reach the threshold of “widespread, long-term and severe damage.”

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183 CIHL, Rule 43.

184 AP I, Arts 35(3) and 55(1); CIHL, Rules 44 and 45.

185 AP I, Art. 55(2); CIHL, Rule 147.

186 Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff, Geneva/Dordrecht, 1987, paras 1452 and 1457.

The 1976 ENMOD Convention takes a slightly different approach. It prohibits the “military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury.”<sup>187</sup> Although the terms used in the ENMOD Convention (“widespread, long-lasting or severe”) are similar to those used in Additional Protocol I (“widespread, long-term and severe”), the use of the word “or” indicates that the ENMOD threshold is not cumulative. Moreover, the ENMOD Convention defines the term “long-lasting” as “lasting for a period of months, or approximately a season.” Overall, therefore, the threshold for prohibited conduct is significantly lower for the deliberate manipulation of the environment for hostile purposes (i.e. the use of the environment *as a means or method of warfare*) than for the direct or incidental infliction of damage on the natural environment (i.e. the use of weapons *against the environment*).<sup>188</sup>

### 3. Non-defended localities and demilitarized zones

In addition to the safety and neutralized zones established in connection with the protection of the wounded, sick and shipwrecked,<sup>189</sup> IHL also provides for the identification/declaration of non-defended localities and the establishment of demilitarized zones, both of which are specifically intended to protect the civilian population from the effects of war.

#### (a) Non-defended localities

A belligerent party can unilaterally declare as a “non-defended locality” any inhabited place near or in a combat zone. Such non-defended localities must fulfil all the following conditions: most notably, all combatants and mobile military equipment must have been evacuated; any remaining military installations must not be used for hostile purposes; and both the authorities and the population must refrain from committing acts of hostility or otherwise supporting military operations. If these conditions are met, the locality in question may be occupied by the enemy, but it may not be attacked by any means whatsoever, and its inhabitants may not be harmed. A locality ceasing to fulfil any one of these conditions loses its status as a non-defended locality but continues to enjoy the protection provided under the general provisions of IHL.<sup>190</sup>

187 ENMOD Convention, 10 December 1976, Art. 1.

188 Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols*, *op. cit.* (note 186), paras 1452 and 1448–1457.

189 See Chapter 4.IV.

190 AP I, Art. 59; CIHL, Rule 37.

### (b) Demilitarized zones

States can at any time agree to confer the status of “demilitarized zone” on any given area. Examples of such demilitarized zones include Antarctica and the Sinai. Such agreements may be concluded in peacetime, as well as after the outbreak of hostilities, and should define both the limits of the demilitarized zone and any methods of supervision. Demilitarized zones are similar to non-defended localities in that their status normally implies that all combatants and mobile military equipment have been evacuated, that no hostile use is made of remaining military installations, that no acts of hostility are committed by the authorities or by the population, and that any activity linked to the military effort has ceased. In the event of an armed conflict, the belligerent parties may not use such demilitarized zones for purposes related to the conduct of military operations, or unilaterally revoke their status as demilitarized zones. Should the preconditions for “demilitarized” status be breached by one belligerent party, the zone loses its status as a “demilitarized” zone but continues to enjoy the protection provided under the general provisions of IHL.<sup>191</sup>

## 4. Civil defence organizations

Since World War II, hostilities have steadily shifted from distinct battlefields into civilian population centres, and many States have therefore established civil defence organizations. In IHL, “civil defence” denotes the performance of certain humanitarian tasks intended to protect the civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities or disasters, and to provide the conditions necessary for its survival. These tasks are: (i) warning; (ii) evacuation; (iii) management of shelters; (iv) management of blackout measures; (v) rescue; (vi) medical services, including first aid, and religious assistance; (vii) fire-fighting; (viii) detection and marking of danger areas; (ix) decontamination and similar protective measures; (x) provision of emergency accommodation and supplies; (xi) emergency assistance in the restoration and maintenance of order in distressed areas; (xii) emergency repair of indispensable public utilities; (xiii) emergency disposal of the dead; (xiv) assistance in the preservation of objects essential for survival; (xv) complementary activities necessary to carry out any of the tasks mentioned above, including, but not limited to, planning and organization.<sup>192</sup>

Civil defence organizations, the personnel assigned exclusively to the performance of civil defence tasks, and civilians volunteering to perform such tasks at the behest of the authorities must be respected and protected and must be allowed to perform their tasks except in case of imperative military

<sup>191</sup> AP I, Art. 60; CIHL, Rule 36.

<sup>192</sup> AP I, Art. 61(a).

necessity. Objects used for civil defence purposes may not be destroyed or diverted from their proper use except by the belligerent party to which they belong.<sup>193</sup> In occupied territories, civil defence organizations are subject to the security regime established by the occupying power, but are also entitled to its support in the performance of their tasks, and are protected against any interference, coercion, requisition or diversion that may jeopardize their mission or prove harmful to the civilian population.<sup>194</sup>

With the consent and under the control of the territorial State or occupying power, civil defence tasks may also be performed by civil defence organizations of neutral or other non-belligerent States. Such activities do not constitute interference in the conflict, but should always be performed with due regard for the security interests of all belligerent parties.<sup>195</sup>

Civil defence organizations, their personnel, buildings and materiel, should be marked by the international distinctive sign of civil defence (equilateral blue triangle on an orange ground).<sup>196</sup> They lose their special protection if they commit or are used to commit, outside their proper tasks, acts harmful to the enemy, although civilian members of a civil defence organization retain their general protection against direct attack unless and for such time as they directly participate in hostilities. The special protection granted to civil defence personnel and objects may cease only after a warning setting a reasonable time limit has gone unheeded. Additional Protocol I stipulates that the following are not to be considered “harmful” to the enemy: the fact that civilian civil defence organizations are controlled by military authorities, organized along military lines, cooperate with military personnel or have military personnel attached to them; that their tasks incidentally benefit military victims; or that civil defence personnel bear light individual weapons for the purpose of maintaining order or for self-defence.<sup>197</sup> Members of the armed forces permanently and exclusively assigned to civil defence organizations and tasks within the national territory of their party must also be respected and protected, provided that they are clearly distinguishable from the other members of the armed forces, are equipped only with light individual weapons for maintaining order or self-defence, do not participate directly in hostilities, do not perform any other military duties and do not commit, outside their civil defence tasks, acts harmful to the adversary.<sup>198</sup>

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193 AP I, Art. 62.

194 AP I, Art. 63.

195 AP I, Art. 64.

196 AP I, Art. 66.

197 AP I, Art. 65.

198 AP I, Art. 67.

### To go further (Protection of civilian objects)<sup>199</sup>

- Sylvain Vité, “[The interrelation of the law of occupation and economic, social and cultural rights: The examples of food, health and property](#),” *IRRC*, Vol. 90, No. 871, September 2008, pp. 629–651.
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### How Does Law Protect in War?

- Case No. 38, [The Environment and International Humanitarian Law](#)
- Case No. 42, [Water and Armed Conflicts](#)
- Case No. 163, [Eritrea/Ethiopia, Awards on Military Objectives](#)
- Case No. 219, [ICTY, The Prosecutor v. Strugar \[Part B., paras 229–233 and 298–329\]](#)
- Case No. 226, [Federal Republic of Yugoslavia, NATO Intervention](#)
- Case No. 252, [Afghanistan, Destruction of the Bamiyan Buddhas](#)

## III. PROPORTIONALITY, PRECAUTIONS AND PRESUMPTIONS

The principle of distinction also entails a duty to prevent erroneous targeting and to avoid or, in any event, minimize the infliction of incidental death, injury and destruction in respect of persons and objects protected against direct attack. Accordingly, IHL requires that, “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population,

<sup>199</sup> All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

civilians and civilian objects.”<sup>200</sup> This applies both to the attacking party to the conflict, which must do everything feasible to avoid erroneous targeting or incidental harm as a result of its own operations (*precautions in attack*),<sup>201</sup> and to the attacked party, which must take all necessary measures to protect the civilian population under its control from the effects of attacks carried out by the enemy (*precautions against the effects of attack*).<sup>202</sup> When a lawful target is attacked and the infliction of incidental civilian harm cannot be avoided, the permissibility of the attack is subject to the principle of proportionality.

## 1. Proportionality

The principle of proportionality prohibits attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>203</sup> Given that direct attacks against civilians and civilian objects are already prohibited, the proportionality evaluation is relevant only when attacks are directed against lawful targets.

The key term to be examined in the proportionality equation is “excessive.” While the requirement of proportionality is absolute, the standard of “excessiveness” is relative. IHL does not establish an objective threshold above which the infliction of incidental harm would always be excessive. In principle, targets with a comparatively high military value (high-value targets) will justify greater incidental harm than targets with a comparatively low military value (low-value targets).

Although the proportionality assessment necessarily contains subjective elements, a certain degree of objective guidance can be derived from the terminology used in the treaty text. Thus, the infliction of incidental harm on protected persons or objects can only be justified by advantages of a “military” nature, and not by political, economic or other non-military benefits. Moreover, the anticipated military advantage must be “concrete” and “direct” and not of a merely hypothetical, speculative or indirect nature. It must also be expected to result from a specific attack or operation, and not from a military campaign as a whole. Therefore, the overarching intention of “winning the war” cannot, as such, serve to justify the infliction of incidental harm on persons and objects protected against direct attack.

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200 AP I, Art. 57(1); CIHL, Rule 15.

201 AP I, Art. 57; CIHL, Rules 15–21.

202 AP I, Art. 58; CIHL, Rules 22–24.

203 AP I, Art. 51(5)(b); CIHL, Rule 14.

When assessing the excessiveness of incidental harm, the foreseeable second- and third-order effects of an attack must also be taken into account. For example, attacks against dual-use infrastructure, such as electrical grids or telecommunication networks, may not only have the immediate effect of preventing the enemy from using that infrastructure for military purposes and exposing the civilian population to short-term shortages. They may well have a crippling effect on the medium- and long-term ability of the civilian authorities and medical services concerned, and of the general civilian population, to cope with the everyday consequences of the war.

## 2. Precautions in attack and presumptions in case of doubt

It has to be stressed that, during all phases of an attack, the principle of precautions in attack must be applied in conjunction with, but also independently of, the principle of proportionality. In other words, even if the expected incidental loss of civilian life, injury to civilians and damage to civilian objects is not excessive in relation to the concrete and direct military advantage anticipated in the attack, the attacking party must still take all feasible precautions to choose means and methods of warfare that will avoid as much incidental harm to civilians as possible.

### (a) Precautionary measures before an attack

Those who plan and decide on an attack must do everything feasible to ascertain that the selected targets are military objectives and that IHL does not otherwise prohibit attacks against them.<sup>204</sup> By default, IHL affords civilian status to all objects failing to positively qualify as military objectives or persons not members of the armed forces or participants in a *levée en masse*. In case of doubt (i.e. in the absence of sufficient evidence to the contrary), therefore, persons must be presumed to be civilians,<sup>205</sup> and objects normally dedicated to civilian purposes, such as places of worship, houses or schools, must be presumed to be civilian objects.<sup>206</sup>

In line with the requirement of proportionality, those who plan or decide on an attack must also do everything feasible to assess whether that attack may be expected to cause excessive incidental harm and, if so, refrain from launching it.<sup>207</sup> This includes the duty to take all feasible precautions, including in the choice of means and methods, with a view to avoiding, and in any event to minimizing, incidental harm to civilians and civilian objects.<sup>208</sup>

204 AP I, Art. 57(2)(a)(i); CIHL, Rule 16.

205 AP I, Art. 50(1).

206 AP I, Art. 52(3).

207 AP I, Art. 57(2)(a)(iii); CIHL, Rules 14 and 18.

208 AP I, Art. 57(2)(a)(ii); CIHL, Rules 15 and 17.



Furthermore, all belligerents have a duty to give effective advance warning of attacks that may affect the civilian population, unless circumstances do not permit (e.g. where the success of an attack depends on the effect of surprise).<sup>209</sup> Where a choice is possible between several military objectives for obtaining a similar military advantage, belligerents must direct their attack against that objective which may be expected to involve the least danger to civilians and civilian objects.<sup>210</sup>

### (b) Precautionary measures during an attack

Even after an attack has commenced, it must be canceled or suspended should it become apparent that the target was mistakenly regarded as a military objective (e.g. a poorly marked military truck that turns out to be used exclusively as an ambulance), that it no longer qualifies as a military objective (e.g. combatants intending to surrender or otherwise *hors de combat*), or that the incidental harm which may be expected to result from the ongoing attack is more significant – or the military advantage less important – than anticipated, thus rendering the former excessive in comparison to the latter under the proportionality principle.<sup>211</sup>

## 3. Precautions against the effects of attacks

IHL requires not only the attacker, but also the party affected by enemy attacks to take precautionary measures. Thus, belligerent parties must take all feasible precautions to protect the civilian population and civilian objects under their control against the dangers resulting from military operations.<sup>212</sup> Most notably, this obligation means that belligerents have a duty, to the maximum extent feasible, to avoid locating military objectives within or near densely populated areas<sup>213</sup> and to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives.<sup>214</sup> In addition, in order to protect the civilian population and civilian objects under their control, belligerent parties may, for example, establish shelters, trenches and safe places, distribute information, warnings and directions to traffic, evacuate civilians, guard civilian property and mobilize civil defence organizations.<sup>215</sup>

209 AP I, Art. 57(2)(c); CIHL, Rule 20.

210 AP I, Art. 57(3); CIHL, Rule 21.

211 AP I, Art. 57(2)(b); CIHL, Rule 19.

212 AP I, Art. 58; CIHL, Rule 22.

213 AP I, Art. 58(b); CIHL, Rule 23.

214 AP I, Art. 58(a); CIHL, Rule 24.

215 CIHL, commentary on Rule 22.

#### 4. The meaning of “feasibility”

The duty of precaution – both in attack and against the effects of attack – is limited to taking those precautionary measures that are “feasible.” In IHL, “(f)feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.”<sup>216</sup> Therefore, the feasibility of precautionary measures will depend on a multitude of factors, such as the available intelligence, the level of territorial control, the precision of available weapons, the urgency of military action and the costs and risks associated with additional precautionary measures. For example, a higher level of precaution can (and must) be expected from a sniper actively searching for targets of opportunity than from an ambushed infantry patrol reacting to unexpected fire. Also, while armed forces can and must be expected not to position anti-aircraft batteries inside civilian population centres, it would hardly be possible to separate dual-use installations such as bridges, railway stations, and airports from the civilian surroundings they are designed to serve. In practice, commanders ultimately will have to decide on the feasibility of precautions on the basis of their own assessment of the information available to them at the time.

### IV. METHODS OF WARFARE

Based on the universal recognition that “the right of the Parties to the conflict to choose methods or means of warfare is not unlimited,”<sup>217</sup> modern IHL has developed an extensive body of rules prohibiting or regulating the development, possession and use of certain weapons (*means of warfare*) and prohibiting or restricting the ways in which such weapons can be used or hostilities can be conducted (*methods of warfare*). The distinction between “means” and “methods” of warfare is important because any weapon (means) can be used in an unlawful manner (method), whereas the use of weapons that have been prohibited because of their inherent characteristics is unlawful regardless of the manner in which they are employed.

Prohibited methods of warfare primarily affecting the civilian population and civilian objects have already been discussed in Sections I and II above, and include most notably:

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216 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II to the Convention on Certain Conventional Weapons), Art. 3(4), Protocol III to the Convention on Certain Conventional Weapons, Art. 1(5), and Amended Protocol II to the Convention on Certain Conventional Weapons, Art. 3(10). See also the French text of AP I, Art. 57 (“*faire tout ce qui est pratiquement possible*”).

217 AP I, Art. 35(1).



G. Diffidenti/ICRC

Mine warning in a village between Gjacova/Djacovica, 2000. More than 500 anti-tank mines have already been removed from around Junik and Prilep, probably the most heavily mined areas in Kosovo.

- the prohibition of direct attacks against civilians and civilian objects, cultural property, and installations containing dangerous forces;<sup>218</sup>
- the prohibition of indiscriminate attacks;<sup>219</sup>
- the prohibition of the use of civilians or other protected persons as human shields;<sup>220</sup>
- the prohibition of acts or threats of violence with the primary purpose of spreading terror among the civilian population;<sup>221</sup>
- the prohibition of methods causing widespread, long-term and severe damage to, or involving the hostile manipulation of, the natural environment;<sup>222</sup>
- the prohibition of starvation of civilians as a method of warfare.<sup>223</sup>

The discussion below therefore focuses on methods of warfare that concern primarily the relation between combatants, namely the protection of persons

218 AP I, Arts 48, 51(2), 52(1), 53 and 56; Hague Convention on Cultural Property, Art. 4; CIHL, Rules 1, 7, 38 and 42.

219 AP I, Art. 51(4); CIHL, Rule 11.

220 GC III, Art. 23(1); GC IV, Art. 28; AP I, Art. 51(7); CIHL, Rule 97.

221 AP I, Art. 51(2); CIHL, Rule 2.

222 AP I, Arts 35(3) and 55; CIHL, Rules 43–45.

223 AP I, Art. 54(1).

*hors de combat*, and the prohibitions against the denial of quarter, perfidy/ treachery and misuse of emblems, signs and uniforms.

### 1. Protection of persons *hors de combat*

According to a longstanding rule of customary and treaty IHL, it is prohibited to attack persons who are recognized or who, in the circumstances, should be recognized as being *hors de combat*. A person is *hors de combat* if he or she is in the power of an adverse Party, clearly expresses an intention to surrender or is incapable of defending himself or herself because of unconsciousness, shipwreck, wounds or sickness, and, in all those cases, abstains from any hostile act and does not attempt to escape.<sup>224</sup>

Persons are “in the power” of a belligerent party not only when they are captured, but also when they are otherwise within the effective physical or territorial control of that party.<sup>225</sup> They can indicate their intention to surrender in various ways, depending on the circumstances. While in land warfare the most common methods are to lay down one’s weapons and raise one’s hands, or to emerge unarmed from cover while raising a white flag, other methods are used to show the intent to surrender in naval and air warfare.<sup>226</sup> If there is any doubt, a good faith determination must be made in the light of the circumstances ruling at the time. In the special case of persons parachuting from an aircraft in distress, attacks are prohibited for the duration of their descent.<sup>227</sup> Once on the ground, they have to be given an opportunity to surrender, unless it is apparent that they are engaging in hostile activities.<sup>228</sup> Of course, this protection does not apply to airborne troops whose descent constitutes part of their hostile operations.<sup>229</sup>

The protection of persons *hors de combat* ceases as soon as they commit a hostile act or attempt to escape. For example, a wounded or surrendering soldier on the battlefield is entitled to no protection if he resumes fighting or tries to escape capture by the enemy. Once a person *hors de combat* has been taken into custody, however, any force used in response to a hostile act or attempted escape must be proportionate to the danger resulting from such act or escape and must actually be necessary to prevent it. Accordingly, the Third Geneva Convention provides that the “use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall

224 AP I, Art. 41(1) and (2); CIHL, Rule 47.

225 Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols*, *op. cit.* (note 186), paras 611–617.

226 *Ibid.*, paras 618–619. See also CIHL, commentary on Rule 47.

227 AP I, Art. 42(1); CIHL, Rule 48.

228 AP I, Art. 42(2).

229 AP I, Art. 42(3).

constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances.”<sup>230</sup>

## 2. Denial of quarter

Related to the protection of persons *hors de combat* is the longstanding prohibition of denial of quarter, according to which “(i)t is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.”<sup>231</sup> The prohibition of denial of quarter makes it illegal to deliberately refuse or render impossible an enemy’s surrender or to put to death those who are *hors de combat*. Where enemies have been captured “under unusual conditions of combat which prevent their evacuation,” they may be disarmed, but treaty IHL expressly requires that “they shall be released and all feasible precautions shall be taken to ensure their safety.”<sup>232</sup>

Given that persons *hors de combat* are already protected, the added value of the prohibition of denial of quarter lies in the restraints it imposes during the conduct of hostilities, namely in the prohibition against *ordering or conducting hostilities on the basis that there shall be no survivors*.<sup>233</sup> Thus, where enemy combatants indicate an intention to surrender or otherwise become *hors de combat*, they must be captured or, if their evacuation is not possible, released. While this may not necessarily facilitate the conduct of small-scale operations in enemy territory, whether by commando units or remote-controlled drones, the law is absolutely clear that there can be no derogation whatsoever from the duty to give quarter and to respect persons *hors de combat*.

In principle, the prohibition against denial of quarter does not prevent belligerents from resorting to surprise attacks or from employing units and weapon systems that are incapable of taking prisoners. However, methods calculated to ensure the complete extermination of the opposing forces, including the wounded and sick and those attempting to surrender, would definitely breach the prohibition against denial of quarter. The point is that an adversary endeavouring to surrender must be given the opportunity to do so when circumstances reasonably permit. In the reality of air warfare, for example, there may not always be room for declarations of surrender, but it would still be unlawful to “double strike” or “finish off” combatants who are already placed *hors de combat* by wounds inflicted in a previous strike. Also,

230 GC III, Art. 42. See also Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols*, *op. cit.* (note 186), para. 1613.

231 AP I, Art. 40. See also Hague Regulations, Art. 23(d), and CIHL, Rule 46.

232 AP I, Art. 41(3). See also Chapter 5.II.2.a.

233 Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols*, *op. cit.* (note 186), para. 1598. Article 23(c) of the Hague Regulations prohibits the killing and wounding of a combatant *hors de combat* separately from the denial of quarter.

the current development of highly sophisticated weapon systems capable of operating autonomously at great speeds raises the question to what extent the prohibition against denial of quarter would be compatible with the near exclusive employment of means of warfare making it virtually impossible for the adversary to surrender. It also prompts more general questions as to the permissibility of such weapons under IHL.<sup>234</sup>

As a minimum, the prohibition against denial of quarter would seem to require that the attacking forces remain receptive to a declaration of surrender should the opportunity arise and that they suspend attacks against persons placed *hors de combat*. In other words, such persons are not to be treated as outlaws who have forfeited all rights under IHL.<sup>235</sup>

### 3. Perfidy or treachery

Additional Protocol I prohibits the use of perfidy to kill, injure or capture an adversary.<sup>236</sup> States not party to the Protocol are bound by the customary prohibition of perfidy, which also prohibits the killing, wounding or capturing of an adversary by resort to perfidy.<sup>237</sup> “Additionally, the customary prohibition against treachery outlaws the treacherous killing or wounding by the belligerent parties of ‘individuals belonging to the hostile nation or army’.”<sup>238</sup> Perfidy or treachery denotes “acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence.”<sup>239</sup> Examples of perfidious or treacherous acts given in treaty IHL include the feigning of surrender or negotiation under a flag of truce, the feigning of an incapacitation by wounds or sickness, the feigning of civilian, non-combatant status, and the feigning of protected status by the use of the signs, emblems or uniforms of the UN or of neutral or other non-belligerent States. Of course, the same applies to the perfidious or treacherous misuse of the protective emblems of the red cross, red crescent or red crystal.

In essence, the prohibition against perfidy or treachery upholds the good faith of the belligerents in the protections afforded by IHL. It does not prohibit ruses of war, that is to say, acts that are intended to mislead an adversary or to induce him to act recklessly, but which do not mislead him with respect to IHL protection and do not otherwise violate IHL. Examples of

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234 AP I, Art. 36.

235 See also Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, Art. 148.

236 AP I, Art. 37.

237 CIHL, Rule 65.

238 Hague Regulations, Art. 23(b).

239 AP I, Art. 37.

such ruses given in treaty IHL include the use of camouflage, decoys, mock operations and misinformation.<sup>240</sup> Thus, the prohibition against perfidy or treachery does not prevent belligerents from carrying out operations that depend on the element of surprise, such as uniformed commando raids and attacks from camouflaged positions or properly marked stealth bombers. Nor would the prohibition against perfidy or treachery prevent mere intelligence gathering by undercover units disguised as civilians. If captured, however, such personnel could be prosecuted as spies under the domestic legislation of the capturing State.

#### 4. Misuse of emblems, signs and uniforms

Apart from the use of perfidy to kill, injure or capture an adversary, IHL also prohibits the misuse of recognized distinctive emblems and emblems of nationality. In particular, it is prohibited to make improper use of emblems, signs or signals provided for in IHL, such as the red cross, red crescent or red crystal, or to deliberately misuse other internationally recognized protective emblems, signs or signals, including the flag of truce, the protective emblem of cultural property (downward pointed square blue shield on white ground), the distinctive signs of civil defence (orange triangle on blue ground) and of installations containing dangerous forces (three orange circles), and the distinctive emblem of the UN.<sup>241</sup> IHL also prohibits the use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or non-belligerent States, whereas those of adverse parties may be used as a ruse of war, except during direct hostile contact with the enemy, namely while engaging in attacks or in order to shield, favour, protect or impede military operations.<sup>242</sup>

## V. MEANS OF WARFARE

### 1. Superfluous injury and unnecessary suffering

Originally, restrictions and prohibitions on the use of certain weapons were motivated by the desire to protect combatants from disproportionate harm and suffering. As early as 1868, the preambular paragraph of the St Petersburg Declaration stated:

“That the only legitimate object (...) during war is to weaken the military forces of the enemy;

<sup>240</sup> *Ibid.* See also CIHL, Rule 57.

<sup>241</sup> Hague Regulations, Art. 23(f); GC I, Arts. 44, 53; GC II, Art. 44; AP I, Arts 37(1)(d), 38; AP II, Art. 12; AP III, Art. 2(3); CIHL, Rules 59–61.

<sup>242</sup> AP I, Art. 39; CIHL, Rules 62 and 63.



That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity.”

This reasoning inspired the emergence of one of the most basic principles of IHL, which prohibits employing “weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”<sup>243</sup> In application of this principle, IHL restricts or prohibits certain types of weapon, the effects of which are considered to be excessively cruel regardless of the circumstances, such as blinding laser weapons, expanding bullets and weapons that injure by means of non-detectable fragments.<sup>244</sup> The prohibition against causing superfluous injury or unnecessary suffering also works as a general principle by which all means and methods of warfare have to be measured.

In the absence of distinct treaty criteria as to what suffering is “unnecessary” and what injury “superfluous,” the rule requires that a balance be struck between considerations of military necessity and of humanity. This seems to be the approach taken by many States<sup>245</sup> and by the ICJ in its Advisory Opinion on nuclear weapons, in which it argues that the prohibition against causing superfluous injury or unnecessary suffering makes it unlawful to cause combatants “harm greater than that unavoidable to achieve legitimate military objectives.”<sup>246</sup> Accordingly, the principle would restrict the permissibility of inflicting injury and suffering on combatants to that which is not otherwise prohibited under IHL and which, additionally, is reasonably necessary to achieve a lawful military purpose in the prevailing circumstances. For example, where the same military advantage can be achieved through less harmful means, considerations of humanity would require the use of such means. While this interpretation of military necessity as a restrictive factor in the use of means and methods of warfare against combatants and other military objectives is not generally accepted, it corresponds best to the original spirit of the St Petersburg Declaration and reflects the official position of the ICRC.<sup>247</sup>

243 Hague Regulations, Art. 23(e); AP I, Art. 35(2); CIHL, Rule 70.

244 See Section V.4.

245 CIHL, commentary on Rule 70.

246 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 38), p. 226, para. 78.

247 See, most notably, N. Melzer, *Interpretive Guidance*, *op. cit.* (note 130), Section IX. For a critique of this approach and the ICRC’s official response, see “Forum on ‘Direct Partic-



→ On the balance between military necessity and humanity, see also Chapter 1.I.3.

## 2. Indiscriminate weapons

Based on the principle of distinction in general and the prohibition against indiscriminate attacks in particular, IHL prohibits the use of weapons that are by nature indiscriminate,<sup>248</sup> that is to say, weapons that either *cannot be directed at a specific military objective*, or *the effects of which cannot be limited as required by humanitarian law* and, consequently, in each case, are of a nature to strike military objectives and civilians or civilian objects without distinction.<sup>249</sup> This also includes weapon systems that, as an inherent feature of the technology employed and their intended use, may be expected to inflict excessive collateral harm on the civilian population.<sup>250</sup> Like the prohibition against causing superfluous injury or unnecessary suffering, the prohibition against using indiscriminate weapons not only operates as an independent principle by which all means and methods of warfare have to be measured, it has also spurred the development of a number of distinct treaties regulating specific weapons, which are discussed below in Section V.4.

## 3. Natural environment

IHL also prohibits the use of weapons that are intended, or may be expected to cause, widespread, long-term and severe damage to the natural environment.<sup>251</sup> As we have seen (Section II.2.d. above), that prohibition has a relatively high threshold. In particular, it may be argued that nuclear weapons should be outlawed because they almost inevitably would have to be expected to cause damage that is “widespread, long-term and severe.” In its 1996 Advisory Opinion on nuclear weapons, the ICJ recognized that important environmental factors had to be taken into account in the implementation of IHL, but did not conclude that the use of nuclear weapons would necessarily be unlawful on this account.<sup>252</sup> It did find, however, that the use of such weapons would be generally contrary to other IHL rules.<sup>253</sup>

## 4. Specifically regulated weapons

Based on the prohibitions against weapons of a nature to cause superfluous injury or unnecessary suffering, indiscriminate weapons, and weapons

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ipation in Hostilities,” *op. cit.* (note 151), pp. 769–916.

248 CIHL, Rule 71.

249 AP I, Art. 51(4); CIHL, Rule 12.

250 AP I, Art. 51(5).

251 AP I, Arts 35(3) and 55; CIHL, Rule 45.

252 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 38), paras 29–31.

253 See Section 4.1.

intended or expected to cause widespread, long-term and severe damage to the natural environment, numerous specific means of warfare have been prohibited or restricted in separate treaties.

**(a) Poison**

The prohibition against the use of poison or poisoned weapons in the conduct of hostilities is a long-standing rule of treaty and customary IHL.<sup>254</sup> The prohibition applies irrespective of military necessity and protects combatants and civilians alike. While treaty law does not provide an express definition of “poison or poisoned weapons,” the ICJ has observed that these terms “have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate.”<sup>255</sup> Under the Rome Statute, the material element of the war crime of employing poison or poisoned weapons requires the use of a substance that “causes death or serious damage to health in the ordinary course of events, through its toxic properties.”<sup>256</sup> The prohibition is not considered to apply to weapons with a merely incidental poisoning effect, but only to weapons that are actually *designed* to kill or injure by the effect of poison. In sum, the prohibition against the use of poison or poisonous weapons outlaws practices such as the poisoning of food and water supplies, the smearing with poison of projectiles, bayonets and other penetrating weapons, or the delivery of toxic substances through gases, injections or any other means.

**(b) Exploding and expanding bullets**

The prohibition against the use of exploding bullets originated in the 1868 St Petersburg Declaration, which banned the use of projectiles weighing less than 400 grams that are either explosive or charged with “fulminating or inflammable substances.” It reflected the consideration that such ammunition would render inevitable the death of combatants injured by such bullets and inflict suffering in excess of that needed to render them *hors de combat*. In the meantime, general State practice has undisputedly undermined this broad prohibition, most notably through the unprotected introduction of exploding anti-aircraft bullets, other exploding anti-materiel ammunition, and grenades lighter than 400 grams. Thus, while contemporary IHL still absolutely prohibits the use of bullets that are designed

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254 Hague Regulations, Art. 23(a); Rome Statute, Art. 8(2)(b)(xvii); Geneva Gas Protocol; CIHL, Rule 72.

255 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 38), para. 55. See also CIHL, commentary on Rule 72.

256 K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, ICRC/Cambridge University Press, 2003, p. 281.

to explode upon impact with the human body, anti-materiel bullets with the same effect are prohibited only if used directly against persons.<sup>257</sup>

For similar reasons, the use of expanding bullets as a means of warfare is prohibited in all armed conflicts.<sup>258</sup> The 1899 Hague Declaration defines expanding bullets as “bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.”<sup>259</sup> Expanding bullets result in significantly larger wounds and thereby dramatically decrease chances of survival for the injured. However, the use of expanding bullets is not prohibited in law enforcement operations, where they are widely employed. The rationale for using expanding bullets in law enforcement operations is threefold. First, expanding bullets generally do not pass through the body of a targeted suspect and therefore make incidental injury to innocent bystanders less likely. Second, the greater stopping effect of expanding bullets increases the chance of immediate incapacitation. Third, the expanding bullets used in law enforcement operations are generally fired from pistols and carry much less energy than rifle bullets, thus resulting in significantly lighter wounds.

### (c) Non-detectable fragments

IHL prohibits the use of “any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays,” such as plastic or glass.<sup>260</sup> The rationale for this prohibition is that non-detectable fragments make it extremely difficult to treat the resulting injuries but entail no military utility and that, therefore, they have to be regarded as inflicting unnecessary suffering. The prohibition is limited, however, to weapons whose “primary effect” is to injure by non-detectable fragments. Weapons that may incidentally cause the same effects, such as bombs or ammunition containing plastic or glass components as part of their design, are not illegal if the non-detectable fragments are produced incidentally and are not part of the primary injuring mechanism.

### (d) Booby-traps and other remote- or timer-controlled devices

The use of booby-traps and other remote or timer controlled devices is regulated primarily in 1996 CCW Amended Protocol II (applicable in

257 CIHL, Rule 78; *United Nations Secretary-General’s Bulletin: Observance by United Nations Forces of International Humanitarian Law*, *op. cit.* (note 114), Section 6.2.

258 CIHL, Rule 77. See also *United Nations Secretary-General’s Bulletin: Observance by United Nations Forces of International Humanitarian Law*, *op. cit.* (note 114).

259 1899 Hague Declaration concerning Expanding Bullets; see also Rome Statute, Art. 8(2)(b)(xix), which employs identical wording to make the use of expanding bullets in international armed conflicts a war crime.

260 Protocol I to the Convention on Certain Conventional Weapons; CIHL, Rule 79. See also *United Nations Secretary-General’s Bulletin: Observance by United Nations Forces of International Humanitarian Law*, *op. cit.* (note 114).

international and non-international armed conflicts),<sup>261</sup> and for the few States not yet party to this treaty, by 1980 CCW Protocol II (applying to international armed conflict only) as well as by customary IHL.<sup>262</sup> “Booby-traps” are defined as “any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.”<sup>263</sup> For example, in the case of a booby-trapped doorway an apparently safe act would be opening the door, and in the case of a booby-trapped phone an apparently safe act would be accepting or making a phone call. “Other devices” are defined as: “manually-emplaced munitions and devices [including improvised explosive devices] designed to kill, injure or damage and which are actuated by remote control or automatically after a lapse of time.”<sup>264</sup>

Of course, to be lawful, the use of booby-traps and other devices must respect the general principles governing the conduct of hostilities, most notably the principles of distinction, proportionality and precaution, as well as the prohibitions against causing superfluous injury or unnecessary suffering, against perfidy and against denial of quarter.<sup>265</sup> Given the nature of booby-traps and other devices and how they tend to be employed, their use can pose a serious danger for civilians. It is lawful only when they are either placed on, or in the close vicinity of, a military objective, or when measures are taken to protect civilians from their effects, for example by placing signs, warnings, sentries or fences.<sup>266</sup> In no circumstances, however, may booby-traps and other devices be attached to or associated with:

- protective emblems, signs or signals (such as the red cross);
- sick, wounded or dead persons; burial or cremation sites or graves;
- medical facilities, equipment, supplies or transports;
- children’s toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children;

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261 Amended Protocol II to the Convention on Certain Conventional Weapons.

262 CIHL, Rule 80.

263 Identical wording is used in Article 2(2) of Protocol II to the Convention on Certain Conventional Weapons and Article 2(4) of Amended Protocol II.

264 Amended Protocol II to the Convention on Certain Conventional Weapons, Art. 2(5), and, without the phrase in square brackets, Protocol II, Art. 2(3).

265 Protocol II to the Convention on Certain Conventional Weapons, Arts 3(2)–(4) and 6(2); and Amended Protocol II to the Convention on Certain Conventional Weapons, Art. 3(3), (7), (8) and (10).

266 Protocol II to the Convention on Certain Conventional Weapons, Art. 4(2); and Amended Protocol II to the Convention on Certain Conventional Weapons, Art. 7(3).

- food or drink;
- kitchen utensils or appliances (except those in military installations);
- animals or their carcasses;
- objects of religious, historical or cultural significance.<sup>267</sup>

This list is complemented by a general prohibition on booby-traps or other devices that are deliberately prefabricated in the form of apparently harmless portable objects and specifically designed to detonate when disturbed or approached.<sup>268</sup> For example, it would be prohibited to prefabricate booby-trapped mobile phones and drop them *en masse* from aircraft over an area controlled by the opposing armed forces. The rationale behind this prohibition is to prevent entire areas from being contaminated with apparently harmless explosive devices likely to harm combatants and civilians indiscriminately. According to the ICRC, the prohibition against booby-traps attached to or associated with objects or persons entitled to special protection under IHL, and with objects likely to attract civilians, has become customary law in all armed conflicts.<sup>269</sup>

Of course, booby-traps must always be used in compliance with the general rules on the conduct of hostilities, including the prohibition against perfidy. Beyond that, even objects that do not benefit from any particular protection under IHL may not be booby-trapped if their use is connected to basic components of society such as food, water, religion and children. Other apparently harmless portable objects can lawfully be booby-trapped, provided that such booby-traps are not deliberately prefabricated.

### (e) Landmines

In IHL, landmines are defined as “a munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle.”<sup>270</sup> When a mine is designed to be exploded by the presence, proximity or contact of a person, and to incapacitate, injure or kill one or more persons, it is termed an “anti-personnel mine.”

267 Protocol II to the Convention on Certain Conventional Weapons, Art. 6(1)(b); and, extended to “other devices,” Amended Protocol II to the Convention on Certain Conventional Weapons, Art. 7(1).

268 Amended Protocol II to the Convention on Certain Conventional Weapons, Art. 7(2); and Protocol II to the Convention on Certain Conventional Weapons, Art. 6(1)(a).

269 CIHL, Rule 80.

270 Anti-Personnel Mine Ban Convention, Art. 2(2). Almost identical wording is used in Protocol II to the Convention on Certain Conventional Weapons, Art. 2, and in Amended Protocol II to the Convention on Certain Conventional Weapons, Art. 2.

The 1997 Anti-Personnel Mine Ban Convention, which is adhered to by the vast majority of States, completely bans the use, development, production, acquisition, stockpiling, retention or transfer of anti-personnel mines.<sup>271</sup> It also sets out specific deadlines for the destruction of anti-personnel mine stockpiles and the clearance of land contaminated with such weapons.

For States not party to the Anti-Personnel Mine Ban Convention but party to Amended Protocol II (or only to the original Protocol, as the case may be) to the Convention on Certain Conventional Weapons, the use of anti-personnel mines is governed by the latter, which prohibits the use of anti-personnel mines that are not detectable. It also prohibits the use of hand-emplaced anti-personnel mines if they do not have self-destruct and self-deactivation mechanisms, unless the mines are placed within a perimeter-marked area monitored by military personnel and protected by visible and durable fencing or other means ensuring the effective exclusion of civilians.<sup>272</sup> Remotely delivered anti-personnel mines (i.e. delivered by artillery, rocket, mortar, aircraft, etc.) must also be equipped with self-destruct and self-deactivation features and any use of them must be recorded.<sup>273</sup>

The Protocol also contains general rules regulating the design and use of landmines (both anti-personnel and anti-vehicle). In summary, it is prohibited to use these weapons if they are designed to explode when detected by commonly available mine-detection equipment or if they are of a nature to cause unnecessary suffering or superfluous injury.<sup>274</sup> It is also prohibited to direct these weapons against civilians or civilian objects or to use them indiscriminately.<sup>275</sup> After the end of active hostilities, the parties to the conflict must remove these mines<sup>276</sup> and take all feasible precautions to protect civilians from their effects.<sup>277</sup> They must, at all times, maintain records on their locations, and take measures to protect missions of the UN, and of the ICRC and other humanitarian organizations, against the effects of these weapons.<sup>278</sup>

According to the ICRC, customary IHL requires that, whenever landmines are used, particular care be taken to minimize their indiscriminate effects,

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271 Anti-Personnel Mine Ban Convention, Art. 1.

272 See Amended Protocol II to the Convention on Certain Conventional Weapons, Art. 5 for further details.

273 Amended Protocol II to the Convention on Certain Conventional Weapons, Art. 6.

274 Amended Protocol II to the Convention on Certain Conventional Weapons, Art. 3(3) and (5).

275 Amended Protocol II to the Convention on Certain Conventional Weapons, Art. 3(7) and (8).

276 Amended Protocol II to the Convention on Certain Conventional Weapons, Arts 3(2) and 10.

277 Amended Protocol II to the Convention on Certain Conventional Weapons, Art. 9.

278 Amended Protocol II to the Convention on Certain Conventional Weapons, Arts 9 and 12.

including by recording their placement and by removing or neutralizing them at the end of active hostilities.<sup>279</sup>

**(f) Incendiary weapons**

In IHL, an “incendiary weapon” is “any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on the target.”<sup>280</sup> Incendiary weapons can take the form of, for example, flame throwers, fougasses, shells, rockets, grenades, mines, bombs and other containers of incendiary substances. However, the category does not include munitions with merely incidental incendiary effects (e.g. illuminants, tracers, smoke or signaling systems). Also excluded are munitions “designed to combine penetration, blast or fragmentation effects with an additional incendiary effect, such as armour-piercing projectiles, fragmentation shells, explosive bombs or similar combined-effects munitions in which the incendiary effect is not specifically designed to cause burn injury to persons, but to be used against military objectives such as armoured vehicles, aircraft and installations or facilities.”<sup>281</sup>

Concern about incendiary weapons dates back to the use of napalm and similar weapons during the Viet Nam War in the 1970s and the impact on civilians. Although a number of States advocated a total ban on incendiary weapons during the negotiations of the Convention on Certain Conventional Weapons, the provisions ultimately adopted in the protocol annexed to that treaty (Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, or Protocol III) restrict rather than prohibit their use. Beyond reiterating the prohibition against direct attacks on civilians, the Protocol bans the use of air-delivered incendiary weapons against military objectives located within a concentration of civilians (i.e. any inhabited cities, towns, villages or camps, or any groups of individual civilians); it also restricts the use of other incendiary weapons to situations where the military objective targeted is clearly separated from the surrounding concentration of civilians and when all feasible precautions are taken with a view to protecting civilians and civilian objects from incidental harm.<sup>282</sup>

The ICRC considers that customary IHL applicable in any armed conflict not only obliges belligerents using incendiary weapons to take particular care to avoid causing incidental harm to civilians, but also that it prohibits the anti-personnel use of such weapons against combatants “if such use would

279 CIHL, Rules 81–83.

280 Protocol III to the Convention on Certain Conventional Weapons, Art. 1(1).

281 Protocol III to the Convention on Certain Conventional Weapons, Art. 1(1)(b).

282 Protocol III to the Convention on Certain Conventional Weapons, Art. 2.

cause unnecessary suffering, i.e. if it is feasible to use a less harmful weapon to render a combatant *hors de combat*.”<sup>283</sup>

#### **(g) Blinding laser weapons**

Customary and treaty IHL prohibits the use of laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness (i.e. irreversible and uncorrectable loss of vision) to unenhanced vision, that is, to the naked eye or to the eye with corrective eyesight devices.<sup>284</sup> Laser systems with an incidental blinding effect, such as certain target recognition or munition guidance systems, and weapons designed to blind temporarily (so-called “dazzling lasers”) are not prohibited blinding laser weapons. When using such permitted laser systems, belligerent parties must take all feasible precautions to avoid causing permanent blindness to unenhanced vision.<sup>285</sup>

#### **(h) Cluster munitions**

“Cluster munitions” are weapons that are dropped from aircraft, or fired by artillery, mortars, rockets and missiles, and subsequently release large numbers of explosive submunitions. These explosive submunitions are generally free-falling and scatter over very wide areas. Incorrect use, wind and other factors can cause them to strike well outside the intended target area. In addition, a significant proportion of submunitions often fail to detonate as intended, contaminating large areas with unexploded ordnance. Like anti-personnel mines, unexploded submunitions often pose a constant threat to the civilian population and hamper agriculture, reconstruction and infrastructure development for many years beyond the end of an armed conflict.

In order to address these dangers, governments in 2008 adopted the Convention on Cluster Munitions, which prohibits the use, production, acquisition, stockpiling, retention and transfer of cluster munitions.<sup>286</sup> It also requires States to destroy their stocks of cluster munitions, to clear contaminated areas and to provide for the medical care, rehabilitation, psychological support, and social and economic inclusion of cluster munition victims in areas under their jurisdiction or control.<sup>287</sup>

Not every weapon system containing submunitions is covered by the Convention on Cluster Munitions. The Convention prohibits those weapons that have been a source of humanitarian concern. For the purposes of the

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<sup>283</sup> CIHL, Rules 84 and 85.

<sup>284</sup> Protocol IV to the Convention on Certain Conventional Weapons, Art. 1; CIHL, Rule 86.

<sup>285</sup> Protocol IV to the Convention on Certain Conventional Weapons, Arts 1–3.

<sup>286</sup> Convention on Cluster Munitions, Art. 1.

<sup>287</sup> Convention on Cluster Munitions, Arts 4 and 5.



Convention, cluster munitions are defined as conventional munitions designed to disperse or release explosive submunitions of less than 20 kilograms each. Excluded from the definition are munitions designed to dispense flares, smoke, pyrotechnics or chaff, or to produce electrical or electronic effects, or the function of which is limited to air defence. Also excluded are munitions containing less than ten explosive submunitions of more than four kilograms each, provided that each of these submunitions is designed to detect and engage a single target object and is equipped to electronically self-destruct and self-deactivate.<sup>288</sup>

**(i) Explosive remnants of war**

During the 1990s, the international community became acutely aware of the humanitarian consequences of anti-personnel mines. However, the problems generated by other forms of unexploded ordnance had not been widely examined. Consequently, there were very few IHL rules to minimize the civilian casualties caused by other weapons, such as unexploded artillery and mortar shells, hand grenades, cluster munitions and bombs, which often pose a significant threat to civilians, peacekeepers and humanitarian workers after the end of an armed conflict. Protocol V to the Convention on Certain Conventional Weapons, on Explosive Remnants of War, was adopted in 2003 to address this problem. The Protocol does not ban or restrict any particular kind of weapon but requires the parties to an armed conflict to take measures to reduce the dangers posed by unexploded and abandoned ordnance (otherwise referred to as “explosive remnants of war”).<sup>289</sup>

Specifically, the Protocol requires each party to a conflict to record information on the explosive ordnance used by its armed forces during a conflict and, after the end of active hostilities, to share that information so as to facilitate the clearance of weapons that have become explosive remnants of war. Once active hostilities have ended, each party is responsible for marking and clearing explosive remnants of war in the territory that it controls. The parties are also required to provide technical, material and financial assistance to facilitate the removal of explosive remnants of war that result from their operations and which are located in areas they do not control. This assistance can be provided directly to the party in control of the territory or through third parties such as the UN, international agencies or non-governmental organizations. Until such weapons are removed or destroyed, each party must take all feasible precautions to protect civilians. This may include fencing and monitoring territory affected by explosive remnants of war, and providing warnings and risk education.

<sup>288</sup> Convention on Cluster Munitions, Art. 2.

<sup>289</sup> The Protocol covers a wide range of explosive ordnance, but does not apply to landmines, booby-traps and other devices, which are covered by other instruments.

Many of the Protocol's requirements are formulated as obligations of means, e.g. "where feasible" or "as far as practicable." Nevertheless, applied in good faith, they provide a strong framework for facilitating a rapid response to explosive remnants of war. Protocol V, the 1997 Anti-Personnel Mine Ban Convention and the 2008 Convention on Cluster Munitions together constitute a comprehensive legal framework for preventing or minimizing the post-conflict deaths, injuries and suffering inflicted by explosive munitions left on the battlefield.

#### (j) Chemical weapons

The use of chemical weapons is prohibited by numerous treaties, including the 1899 Hague Declaration concerning Asphyxiating Gases, the 1925 Geneva Gas Protocol, the 1993 Chemical Weapons Convention, and the Rome Statute. The prohibition is also considered to be customary law in any armed conflict.<sup>290</sup> The most comprehensive regulatory regime is set out in the 1993 Chemical Weapons Convention, which defines chemical weapons as "toxic chemicals and their precursors, except where intended for purposes not prohibited," munitions exclusively designed for the delivery of toxic chemicals and other equipment designed for use with such munitions.<sup>291</sup> The Chemical Weapons Convention prohibits not only the use of chemical weapons, but also their development, production, acquisition, stockpiling, retention and transfer. The prohibition applies "under any circumstances" and can therefore be regarded as absolute. The Convention further requires the destruction of both chemical weapons production facilities and the weapons themselves, and establishes a verification regime overseen by the Organisation for the Prohibition of Chemical Weapons and requiring States Parties: (1) to provide national reporting on industrial chemical production; (2) to accept continuous and routine inspections of treaty-related facilities; (3) and to allow short-notice challenge inspections of any facility on national territory. Finally, the Convention also prohibits the use of riot-control agents, albeit only as a method of warfare and not for the purposes of law enforcement.<sup>292</sup>

#### (k) Biological weapons

The 1925 Geneva Gas Protocol bans the use of bacteriological agents in warfare, and the 1972 Biological Weapons Convention prohibits the development, production and stockpiling of "microbial or other biological agents, or toxins" of types and in quantities that have no justification for peaceful purposes, and of weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflicts. The prohibition against biological weapons is considered to apply as customary

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290 CIHL, Rule 74.

291 Chemical Weapons Convention, Art. II(1).

292 Chemical Weapons Convention, Art. I(5); CIHL, Rule 75.

law in any armed conflict.<sup>293</sup> Biological weapons affecting exclusively the non-human environment would have to be separately evaluated under the prohibition against weapons designed or expected to cause widespread, long-term and severe damage to the natural environment.

→ On the special protection afforded to the natural environment, see Section II.2.d. above.

### (I) Nuclear weapons

Nuclear weapons have severe humanitarian consequences resulting from the heat, blast and radiation generated by a nuclear explosion and the distances over which these forces may be spread. The detonation of a nuclear weapon in or near populated areas can cause enormous numbers of casualties and extensive damage to civilian infrastructure, rendering effective medical and humanitarian assistance almost impossible in the immediate aftermath. Many survivors will subsequently succumb to radiation sickness or certain kinds of cancer. Since their first and only use in Hiroshima and Nagasaki in 1945, the international community has wrestled with the legality of nuclear weapons under international law.

At present, IHL does not expressly ban the use of nuclear weapons in armed conflicts.<sup>294</sup> In its 1996 Advisory Opinion, the ICJ concluded that the use of nuclear weapons would be “generally contrary” to the principles and rules of IHL, but was unable to “reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.”<sup>295</sup> The ICJ did find, however, that States were under an obligation to conduct negotiations with a view to nuclear disarmament.

In 2011, the Movement updated its position on nuclear weapons, indicating that it “finds it difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law, in particular the rules of distinction, precaution and proportionality.”<sup>296</sup> It also made a historic appeal, calling on States to ensure that nuclear weapons are never again used, regardless of their views on the legality of such weapons, and to urgently pursue

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293 CIHL, Rule 73.

294 For further developments related to arms control in the field of nuclear weapons, see, for example, the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, 14 February 1967.

295 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 38), para. 97.

296 *Working toward the elimination of nuclear weapons*, Resolution 1, Council of Delegates, Geneva, 2011. Available at: <http://www.icrc.org/eng/assets/files/publications/icrc-002-1130.pdf>

and conclude negotiations to prohibit the use of and completely eliminate nuclear weapons through a legally binding international agreement.

### 5. Legal review of new weapons and technologies of warfare

Article 36 of Additional Protocol I states: “In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by (...) international law.” The obligation to conduct a legal review of new weapons applies both in times of armed conflict and in times of peace, and aims to ensure that the weapons developed, manufactured or procured by States comply with international law. More specifically, the purpose of a weapons review is to prevent the use of weapons that would always violate international law and to restrict the use of those that would violate international law in some circumstances. The obligation to conduct a weapons review also applies to all States irrespective of their treaty obligations because they are legally responsible for ensuring that they do not use prohibited weapons or use lawful weapons in a manner that is prohibited.<sup>297</sup>

The systematic and comprehensive legal review of every new weapon system is instrumental to ensuring respect for IHL in operational practice. In essence, when conducting a legal review of a particular weapon system, a State must determine whether that system’s “normal or expected use would be prohibited under some or all circumstances,”<sup>298</sup> in other words, whether the weapon system is *capable* of being used in compliance with IHL. The answer to this question depends on whether all or part of the weapon system, in some or all circumstances:

- would already be prohibited under a specific weapons treaty;
- would constitute an indiscriminate weapon;
- would be of a nature to cause superfluous injury or unnecessary suffering, or widespread, long-term and severe damage to the natural environment;
- would contradict the “principles of humanity” or “public conscience” (Martens Clause).

In practice, a weapon’s effects will always result from a combination of design and the manner in which it is used. In assessing the legality of a particular weapon, therefore, the reviewing authority must examine not only the weapon’s

<sup>297</sup> See GC I–IV, common Art. 1.

<sup>298</sup> Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols*, *op. cit.* (note 186), para. 1469.

inherent design and characteristics but also how, when and where it is intended to be used.

The duty to systematically review the legality of weapons is of particular importance today in light of the rapid development of new weapons technologies, such as remote-controlled drones and increasingly autonomous robots, cyber capabilities, nanotechnology, and the militarization of space. Arguably, this duty can also be derived from the Martens Clause, which is considered to be customary law. The ICJ, when discussing the “cardinal principles” of IHL in its Advisory Opinion on nuclear weapons, recognized that the Martens Clause “had proved to be an effective means of addressing the rapid evolution of military technology.”<sup>299</sup> Thus, a weapon that does not contravene any existing rules of treaty IHL could nevertheless be considered unlawful if it were found to be contrary to the principles of international law as derived from custom, the principles of humanity or the dictates of public conscience. The Clause makes clear that the general principles and values that have inspired the restriction of warfare throughout history remain valid also in the face of today’s rapidly developing weapons technology. For example, while IHL does not expressly restrict the permissibility of autonomous weapon systems, serious ethical challenges requiring consideration from the perspective of “humanity” and “public conscience” may well arise when it comes to delegating “life-and-death” decisions to autonomous machines. While not a regulatory provision in itself, therefore, the Martens Clause nevertheless provides essential guidance for interpreting, applying and amending individual provisions in line with the objects and purposes of IHL as a whole.

→ For more information on the Martens Clause, see Chapter 1.II.3.

While the legal challenges arising in the review of such systems may be significant, this is not the place to discuss these questions in detail. For the present purposes, suffice it to point out that there can be no doubt that the existing rules and principles of IHL apply to any emerging weapons technology.

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299 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 38), paras 78 ff.

### To go further (Methods and means of warfare)<sup>300</sup>

- ICRC e-learning module, *The means and methods of warfare*. Available at: <http://www.icrcproject.org/elearning/en/ihl/M7/index.html>
- William Boothby, *Weapons and the Law of Armed Conflict*, Oxford University Press, 2009, 464 pp.
- Michael Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, 2013.
- Nils Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare*, European Parliament, Directorate-General for External Policies of the Union, Directorate B, Policy Department, Brussels, 2013.
- Dominique Loyer and Robin Coupland, “[The 1899 Hague Declaration concerning expanding bullets: A treaty effective for more than 100 years faces complex contemporary issues](#),” *IRRC*, Vol. 85, No. 849, March 2003, pp. 135–142.
- Cordula Droege, “[Get off my cloud: Cyber warfare, international humanitarian law, and the protection of civilians](#),” *IRRC*, Vol. 94, No. 886, Summer 2012, pp. 533–578.
- “[Means of warfare](#),” *IRRC*, Vol. 87, No. 859, September 2005.
- “[Methods of warfare](#),” *IRRC*, Vol. 88, No. 864, December 2006.
- “[New technologies and warfare](#),” *IRRC*, Vol. 94, No. 886, Summer 2012.
- ICRC, [A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977](#), ICRC, Geneva, 2007.
- Geneva Academy of International Humanitarian Law and Human Rights, *Weapons Law Encyclopaedia*. Available at: <http://www.weaponslaw.org>

### How Does Law Protect in War?

- Case No. 62, [ICJ, Nuclear Weapons Advisory Opinion](#)
- Case No. 80, [United States, Memorandum of Law: The Use of Lasers as Anti-Personnel Weapons](#)
- Case No. 92, [United States Military Court in Germany, Trial of Skorzeny and Others](#)
- Case No. 179, [United States, Surrendering in the Persian Gulf War](#)

<sup>300</sup> All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

## VI. SPECIFIC ISSUES ARISING IN NON-INTERNATIONAL ARMED CONFLICTS

Although the final draft of Additional Protocol II contained essentially the same rules on the conduct of hostilities as Additional Protocol I, almost all of them were deleted from the draft in a last-minute attempt to obtain a consensus on a “simplified” version of the treaty. The reason for this move was that many contracting States wanted to avoid giving the impression that dissident armed forces, insurgent groups and other non-State belligerents taking up arms against their government could benefit from any level of legitimacy or privilege. As a result, current treaty IHL governing non-international armed conflicts does not contain a specific chapter on the conduct of hostilities defining key combat-related terms such as “civilians,” “armed forces” and “attacks,” or regulating the preparation and conduct of military operations in any significant detail. Nevertheless, common Article 3 and Additional Protocol II reflect essentially the same rationale as treaty IHL governing the conduct of hostilities in international armed conflicts. Thus, all provisions of IHL governing non-international armed conflicts are equally binding on all belligerent parties, regardless of whether they are States or non-State armed groups (*equality of belligerents*). Also, Additional Protocol II essentially replicates the corresponding provisions of Additional Protocol I when it expressly prohibits the denial of quarter<sup>301</sup> and attacks against the civilian population,<sup>302</sup> objects indispensable to the survival of the civilian population,<sup>303</sup> works and installations containing dangerous forces,<sup>304</sup> and cultural objects and places of worship.<sup>305</sup>

### 1. Protection of the civilian population

In essence, treaty IHL applicable in non-international armed conflicts builds on the same cardinal distinction between fighters and civilians as IHL governing international armed conflicts. In IHL governing non-international armed conflicts, the first category is composed of the “armed forces,” “dissident armed forces” and “other organized armed groups” carrying out “sustained and concerted military operations” under “responsible command,” whereas the second category comprises the “civilian population” and “individual civilians,” who “enjoy general protection against the dangers arising from military operations” conducted by these armed forces or groups.”<sup>306</sup> Accordingly, direct attacks against the civilian population and individual

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301 AP II, Art. 4(1).

302 AP II, Art. 13.

303 AP II, Art. 14.

304 AP II, Art. 15.

305 AP II, Art. 16.

306 GC I–IV, common Art. 3; AP II, Arts 1(1) and 13(1).

civilians, along with acts or threats of violence the primary purpose of which is to spread terror among the civilian population, are prohibited.<sup>307</sup> Civilians are entitled to this protection in all circumstances, unless and for such time as they take a direct part in hostilities.<sup>308</sup>

Although treaty IHL does not expressly require those planning and conducting military operations in non-international armed conflicts to take feasible precautionary measures in attacks and against the effects of attacks, or to abstain from attacks that may be expected to cause excessive incidental harm to civilians and civilian objects, the relevant provisions applicable in international armed conflicts are considered to apply as customary law in non-international armed conflicts as well.<sup>309</sup>

## 2. Organized armed groups

The fact that there is no formal privilege of combatancy in situations of non-international armed conflict does not mean that the fighting forces of the belligerent parties are civilians. It is generally recognized that members of State armed forces do not qualify as civilians, and the wording and logic of common Article 3 and Additional Protocol II suggest that the same applies to members of organized armed groups. Also, State practice confirms that members of organized armed groups fighting for a non-State party to a conflict lose their civilian status and, in principle, may be lawfully attacked in the same way as State combatants in international armed conflicts. In a generic sense, and for the purposes of the principle of distinction, therefore, the fighting personnel of a non-State party to a conflict are sometimes also described as “fighters” or “unprivileged combatants.”

Organized armed groups constitute the armed forces (i.e. the military wing) of a non-State party to a conflict and must not be confused with the party itself (e.g. an insurgency or rebellion as a whole, including its political or administrative wing) or with other supportive segments of the civilian population. Where part of the armed forces turns against its own government, membership in such “dissident armed forces” will (at least initially) depend on the same formal criteria that determine membership in the governmental armed forces. Other organized armed groups, however, are essentially made up of persons recruited from the civilian population. In many armed conflicts, civilians may support a non-State belligerent in many different ways and may even take a direct part in hostilities on a spontaneous, sporadic or unorganized basis. For the purposes of the

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307 AP II, Art. 13(2); CIHL, Rules 1 and 2.

308 AP II, Art. 13(3); CIHL, Rule 6.

309 CIHL, Rules 14–24.



principle of distinction, however, they cannot be regarded as members of an organized armed group unless they assume a continuous combat function for a belligerent party (i.e. a continuous function involving their direct participation in hostilities). Continuous combat function does not imply that they are entitled to the privilege of combatancy, prisoner-of-war status, or any other form of immunity from domestic prosecution for lawful acts of war. Rather, it makes a strictly functional distinction between members of the organized fighting forces and the civilian population. Thus, while in international armed conflicts members of the armed forces have the “right” to directly participate in hostilities on behalf of a belligerent party (*combatant’s privilege*), members of organized armed groups in non-international armed conflicts have the “function” to do so (*combat function*). In sum, just as is the case in international armed conflicts, only members of the actual fighting forces lose their civilian status and protection; supporters, sympathizers and political or religious leaders remain part of the civilian population and may only be attacked if and for such time as they directly participate in hostilities.<sup>310</sup>

→ See also the membership criteria for irregular armed forces in international armed conflicts, in Section I.1.a. above.

### 3. Military objectives, civilian objects and specially protected objects

Treaty IHL applicable in non-international armed conflicts defines military objectives and civilian objects in the same terms as Additional Protocol I does for international armed conflicts.<sup>311</sup> The relevant provisions prohibiting attacks and reprisals against civilian objects in international armed conflicts are considered to apply as customary law in non-international armed conflicts as well.<sup>312</sup> Furthermore, Additional Protocol II expressly provides special protection for objects indispensable to the survival of the civilian population, installations containing dangerous forces and cultural property, and uses similar terms as the provisions applicable in international armed conflicts.<sup>313</sup> In particular, the Second Protocol to the Hague Convention on Cultural Property extends the Convention’s applicability to non-international armed conflicts.

310 For the ICRC’s official position on this issue see N. Melzer, *Interpretive Guidance*, *op. cit.* (note 130), Section II.

311 Amended Protocol II to the Convention on Certain Conventional Weapons, Art. 2(6) and (7). See Section II.1.

312 CIHL, Rules 7, 10 and 148.

313 AP II, Arts 14–16.

#### 4. Weapons regulation in non-international armed conflicts

Common Article 3 and Additional Protocol II do not contain any general provisions regulating the use of certain weapons in non-international armed conflicts. As “cardinal principles” of customary international law, however, the principle of distinction, the prohibition against causing unnecessary suffering, and the Martens Clause govern the lawfulness of weapons in any armed conflict, including those that are non-international in nature.<sup>314</sup> As the ICTY rightly observed, “Elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars cannot but be inhumane and inadmissible in civil strife.”<sup>315</sup> Consequently, a number of weapon-specific prohibitions or restrictions are applicable as customary law in non-international armed conflicts as well, including the prohibition against poisonous, biological and chemical weapons, blinding laser weapons, expanding and exploding bullets, and non-detectable fragments, along with restrictions on the use of incendiary weapons and of mines, booby-traps and other devices.<sup>316</sup>

The growing recognition that the humanitarian prohibitions and restrictions on certain weapons must apply equally in all armed conflicts is also reflected in Amended Protocol II to the Convention on Certain Conventional Weapons, which applies to both international and non-international armed conflicts, and in the fact that, in 2001, Article 1 of the Convention was amended to extend the applicability of the Convention and its four protocols at that time (and subsequently of Protocol V) to non-international armed conflicts and to non-State parties to such conflicts. Even more expansive is the scope of applicability of the Chemical Weapons Convention, the Anti-Personnel Mine Ban Convention and the Convention on Cluster Munitions, all of which apply in “any circumstances,” regardless of their legal classification.

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314 AP II, Preamble; CIHL, Rules 70 and 71.

315 ICTY, *The Prosecutor v. Dusko Tadić*, *op. cit.* (note 70), para. 119.

316 CIHL, Rules 72–86.

### To go further (Specific issues arising in non-international armed conflicts)<sup>317</sup>

- Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, pp. 386–429.
- *The Manual on the Law of Non-International Armed Conflict*, International Institute of Humanitarian Law, San Remo, 2006, pp. 18–45. Available at: <http://www.iihl.org/wp-content/uploads/2015/12/Manual-on-the-Law-of-NIAC.pdf>
- Jean-Marie Henckaerts, “[Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict](#),” *IRRC*, Vol. 87, No. 857, March 2005, pp. 188–190.
- Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, 85 pp.

### *How Does Law Protect in War?*

- Case No. 245, [Human Rights Committee, Guerrero v. Colombia](#)
- Case No. 257, [Afghanistan, Goatherd Saved from Attack](#)
- Case No. 272, [Civil War in Nepal](#)
- Case No. 278, [Angola, Famine as a Weapon](#)



# Chapter 4

## The wounded and sick and the medical mission



C. Cardon De Lichtbuer/ICRC

South Kivu, Democratic Republic of the Congo, 2013. Evacuation of four ailing adults and six children, three of them severely malnourished, from a remote area to health centres in Bukavu.

## Structure

- I. The wounded, the sick and the shipwrecked
- II. Medical and religious personnel
- III. Medical units and transports
- IV. Hospital, safety and neutralized zones
- V. The distinctive emblems
- VI. The missing and the dead
- VII. Specific issues arising in non-international armed conflicts

### In a nutshell

- The wounded and sick must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition.
- The wounded, the sick and the shipwrecked, medical and religious personnel, and medical units and medical transports must be protected and respected in all circumstances.
- Medical personnel must treat patients impartially, regardless of sex, race, nationality, religion, political opinion or any other similar criteria.
- No one may be compelled to perform medical activities contrary to the rules of medical ethics, or punished for carrying out medical activities compatible with medical ethics, regardless of the beneficiary.
- Medical personnel may not be compelled to give any information that would prove harmful to the wounded and the sick, or to their families, except as required by law.
- The dead must be treated with respect and protected against mutilation and pillage.
- Whenever circumstances permit, and particularly after an engagement, each party to a conflict must, without delay, take all possible measures to search for, collect and evacuate the wounded, the sick, the shipwrecked and the dead.
- Belligerent parties must take all feasible measures to account for persons reported missing as a result of an armed conflict and provide their family members with any information they have on their fate.

### To go further<sup>318</sup>

- *Health care in danger: The human cost*, film, ICRC, 2013. Available at: <http://www.youtube.com/watch?v=Cr3eknFzhWs>
- ICRC e-learning module, *Health care in danger: The legal framework*. Available at: <http://www.icrcproject.org/elearning/health-care-in-danger2/>
- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, [Chapter 7: Protection of the wounded, sick and shipwrecked](#), pp. 195–209.
- Larissa Fast, *Aid in Danger: The Perils and Promise of Humanitarianism*, University of Pennsylvania Press, Philadelphia, 2014, 336 pp.
- Alexander Breitegger, “[The legal framework applicable to insecurity and violence affecting the delivery of health care in armed conflicts and other emergencies](#),” *IRRC*, Vol. 95, No. 889, Spring 2013, pp. 83–127.
- Fiona Terry, “[Violence against health care: Insights from Afghanistan, Somalia, and the Democratic Republic of the Congo](#),” *IRRC*, Vol. 95, No. 889, Spring 2013, pp. 23–39.
- Pierre Gentile, “[Q&A: Health care in danger](#),” *IRRC*, Vol. 95, No. 890, Summer 2013, pp. 341–350.
- “[Violence against health care: The problem and the law](#),” *IRRC*, Vol. 95, No. 889, Spring 2013.
- “[Violence against health care: The way forward](#),” *IRRC*, Vol. 95, No. 890, Summer 2013.
- ICRC, *Health Care in Danger: The Responsibilities of Health-Care Personnel Working in Armed Conflicts and Other Emergencies*, ICRC, Geneva, 2012, 104 pp.

It was the agony of 40,000 wounded and dying soldiers on the battlefield of Solferino that moved Henry Dunant to initiate the process that led to the adoption of the original Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field in 1864 and of the red cross on a white ground as the protective emblem of military medical services.<sup>319</sup> To this day, one of the most tragic aspects of armed conflict is the enormous amount of suffering, mutilation and death caused by wounds and sickness resulting from the ravages of war. Modern treaty IHL recognizes

318 All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

319 See *150 years of humanitarian action: The battle of Solferino*, film, ICRC, 2014. Available at: <http://www.youtube.com/watch?v=Rr8pRVduqWQ>

death, injury and destruction as an inevitable side-effect of armed conflict, but aims to prevent human suffering where it is unnecessary and to alleviate it where it cannot be prevented. The very same idea that motivated Henry Dunant on the battlefield of Solferino in 1859 went on to inspire the 1949 Geneva Conventions and their Additional Protocols, in particular their rules on the protection of the wounded and sick and the medical mission.

## I. THE WOUNDED, THE SICK AND THE SHIPWRECKED

### 1. Scope of personal protection

Originally, treaty IHL governing international armed conflicts strictly limited its protection to wounded, sick and shipwrecked members of the armed forces. Thus, the initial Geneva and Hague Conventions protected “combatants”<sup>320</sup> or, in the case of naval forces, “sailors and soldiers,”<sup>321</sup> and subsequent versions only slightly expanded their protective scope to “other persons officially attached” to the fleets or armies of belligerent parties.<sup>322</sup> After World War II, a first attempt was made to ensure medical care and protection for all persons in need of medical attendance, including those belonging to the civilian population. Although the First and Second Geneva Conventions still limited their protection to those categories of person entitled to prisoner-of-war status under the Third Geneva Convention,<sup>323</sup> the Fourth Geneva Convention aimed to ensure the provision of protection and care to all other persons who were wounded, sick or otherwise in need of medical attention.<sup>324</sup>

It was only with the adoption of Additional Protocols I and II of 1977 that the concepts of “wounded,” “sick” and “shipwrecked” were finally defined as including all persons irrespective of their military or civilian status. Thus, according to Additional Protocol I:

- “wounded’ and ‘sick’ mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover

320 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864, Art. 6(1).

321 Hague Convention No. III for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, 29 July 1899, Art. 8.

322 Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 6 July 1906 and 27 July 1929, Art. 1(1); Hague Convention No. X for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, 18 October 1907, Art. 11.

323 GC I and II, Art. 13; GC III, Art. 4.

324 GC IV, Arts 16–22, 38(2), 55–57, 81(1), 85 and 91–92.



maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility”;<sup>325</sup>

- “‘shipwrecked’ means persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility. These persons, provided that they continue to refrain from any act of hostility, shall continue to be considered shipwrecked during their rescue until they acquire another status under the Conventions or this Protocol.”<sup>326</sup>

Additional Protocol I also specifies that its provisions aiming to protect the wounded, sick and shipwrecked apply to all persons affected by a situation of international armed conflict, without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.<sup>327</sup> Today, in the ICRC’s view, this comprehensive scope of protection can be regarded as part of customary IHL applicable in all armed conflicts.<sup>328</sup>

The treaty definition of the wounded, sick and shipwrecked only covers persons refraining from any act of hostility, but it does not require actual incapacitation of the persons in question by wounds, sickness or shipwreck. For military personnel and others who have directly participated in hostilities, refraining from acts of hostility is also a precondition for being recognized as *hors de combat*.<sup>329</sup> Thus, a wounded person who continues or resumes fighting the enemy is neither *hors de combat* nor protected as a wounded person within the meaning of IHL. Conversely, a combatant needing medical treatment who refrains from any act of hostility benefits from protection as a wounded person even if his wounds have not incapacitated him.

The fact that someone is entitled to specific protection as a wounded, sick or shipwrecked person does not preclude that same person from also benefiting from protection under other rules of IHL. Thus, in addition to the specific care and protection afforded to the wounded, sick and shipwrecked under the First and Second Geneva Conventions, persons entitled to prisoner-of-war status who have fallen into the power of the enemy will benefit from

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325 AP I, Art. 8(a).

326 AP I, Art. 8(b).

327 AP I, Art. 9(1); CIHL, Rules 109 and 110.

328 CIHL, commentary on Rule 109.

329 AP I, Art. 41(2); CIHL, Rule 47.

the protection of the Third Geneva Convention until their final release and repatriation.<sup>330</sup> Other persons will continue to benefit from the Fourth Geneva Convention and the fundamental guarantees of Additional Protocol I until the end of the hostilities or, as the case may be, until their release, repatriation or re-establishment.<sup>331</sup>

→ On the concept of *hors de combat*, see Chapter 3.IV.1.

## 2. Respect, protection and care

The wounded, sick and shipwrecked must be respected and protected in all circumstances and wherever they are.<sup>332</sup> As always in the context of IHL, the word “respect” denotes a duty to refrain from attack, abuse or any other act likely to cause danger or injury. This obligation applies not only to the armed forces, but also to the civilian population, which must in particular abstain from any act of violence against the wounded, sick and shipwrecked.<sup>333</sup> The word “protect,” on the other hand, always implies a positive obligation to shield the persons in question from harm and to proactively safeguard their rights. In the case of the wounded, sick and shipwrecked, the duty to protect also requires that they be searched for and collected, whereas the provision of medical care is regarded as a conceptually separate, additional obligation tailored to the specific needs of these categories of person.<sup>334</sup> Accordingly, whenever feasible, and particularly after military engagements, each party to the conflict must search for, collect and evacuate the wounded, sick and shipwrecked from the zone of hostilities, or from besieged or encircled areas, and protect them against ill-treatment and pillage.<sup>335</sup> If a belligerent party is forced to abandon wounded or sick members of its armed forces to the enemy it must, as far as military considerations permit, leave with them part of its medical personnel and material to assist in their care.<sup>336</sup> In any case and at all times, belligerent parties must treat the wounded, sick and shipwrecked humanely and, to the fullest extent practicable, provide them with the required medical treatment without distinction or priority on any grounds other than medical ones.<sup>337</sup>

330 GC I, Arts 5 and 14; GC II, Art. 16; GC III, Art. 5(1).

331 GC IV, Art. 6(4); AP I, Art. 75.

332 GC I, Arts 4 and 12; GC II, Arts 5 and 12(1); GC IV, Art. 16 (1); AP I, Art. 10(1).

333 GC I, Art. 18(2); AP I, Art. 17(1); CIHL, Rule 111.

334 See, e.g., Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols*, *op. cit.* (note 186), paras 446–448.

335 GC I, Art. 15; GC II, Art. 18; CIHL, Rules 109 and 111.

336 GC I, Art. 12(5).

337 GC I and II, Art. 12(2) and (3); AP I, Arts 9(1) and 10(2); CIHL, Rule 110.

The duty of a belligerent party to respect, protect and care for the wounded, sick and shipwrecked in its power implies that their physical or mental health and integrity may not be endangered by any unjustified act or omission.<sup>338</sup> On the most basic level this means, of course, that the wounded, sick and shipwrecked may not be murdered or exterminated, subjected to torture, or deliberately left without medical care or exposed to contagion or infection.<sup>339</sup> Further, wounded, sick and shipwrecked persons may not be subjected to any medical procedure that is not warranted by their state of health and not consistent with generally accepted medical standards, including, in particular, any unwarranted mutilations, experiments, and removal of tissue or organs.<sup>340</sup> In order to avoid abuse, each party to a conflict must keep a medical record for inspection by the Protecting Power or the ICRC, which should list all medical procedures undertaken with respect to persons who are deprived of their liberty for reasons related to the conflict.<sup>341</sup>

### **To go further (The wounded, the sick and the shipwrecked)**<sup>342</sup>

- Jann K. Kleffner, “Protection of the wounded, sick, and shipwrecked,” in Dieter Fleck, *Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford, 2013, pp. 321–332.
- ICRC, *Commentary on the First Geneva Convention*, 2nd ed., ICRC/Cambridge University Press, 2016, Articles 12 and 15.

### ***How Does Law Protect in War?***

- Case No. 91, [British Military Court at Hamburg, The Peleus Trial](#)
- Case No. 147, [Israel, Navy Sinks Dinghy off Lebanon](#)

## **II. MEDICAL AND RELIGIOUS PERSONNEL**

The wounded, sick and shipwrecked cannot be protected unless the medical and religious personnel coming to their aid also benefit from protection. The latter must have access to the wounded and sick on the battlefield, must be protected against all acts of hostility and must be allowed to perform their medical or religious functions without impediment even if they fall into the power of the enemy.

338 AP I, Art. 11(1).

339 GC I and II, Art. 12(2); CIHL, Rule 111.

340 AP I, Art. 11(1), (2) and (3).

341 AP I, Art. 11(6).

342 All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

## 1. Definitions

### (a) Medical personnel

According to Additional Protocol I, the term “medical personnel” refers to military or civilian persons who have been formally assigned by a party to a conflict to one of the following purposes:

- medical purposes *stricto sensu*, i.e. the search for, collection, transportation, diagnosis or treatment of the wounded, sick and shipwrecked, or the prevention of disease;
- the administration of medical units, or the operation or administration of medical transports.

Such assignments may be permanent or temporary, but must always be exclusive, which means that belligerent parties may not assign such personnel duties other than their medical functions.<sup>343</sup>

### (b) Categories of medical personnel

IHL divides medical personnel into three basic categories.

- *Medical personnel of a party to a conflict*: This first category includes the permanent and temporary medical personnel of the armed forces, the navy and the merchant marine, but also the medical personnel and crews of hospital ships. It further includes civilian medical personnel, and those assigned to civil defence organizations.<sup>344</sup>
- *Medical personnel of National Societies or other voluntary aid societies*: The second category includes personnel of National Societies or other national voluntary aid societies duly recognized and authorized by the belligerent parties. In order to be regarded as “national,” such societies must be established in the territory of the belligerent party concerned; in order to be “recognized,” they generally must be constituted in accordance with national law and regulations; and they can be considered as “authorized” by a belligerent party when they are officially permitted to employ medical personnel on its behalf and under its military laws and regulations.<sup>345</sup>
- *Medical personnel seconded by neutral States or humanitarian organizations*: The third category comprises medical personnel of medical units or transports made available to a party to the conflict for humanitarian purposes: (i) by a neutral or other non-belligerent

343 AP I, Art. 8(c) and (k); Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols*, *op. cit.* (note 186), para. 353.

344 GC I, Arts 24 and 25; GC II, Arts 36 and 37; AP I, Arts 8(c)(i) and 61(a)(vi).

345 GC I, Art. 26; AP I, Art. 8(c)(ii); Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols*, *op. cit.* (note 186), para. 358.

State, (ii) by a recognized and authorized aid society of such a State; or (iii) by an impartial international humanitarian organization.<sup>346</sup>

**(c) Official assignment versus spontaneous charity**

Only persons who have been formally assigned to medical duties by a belligerent party qualify as medical personnel in the technical sense. Other persons performing medical functions are generally protected as civilians, but are not entitled to use the distinctive emblems and do not enjoy the special rights and privileges of medical personnel on the battlefield or when they fall into enemy hands. This does not mean, of course, that modern IHL discourages the kind of spontaneous charity and humanitarian action that inspired Henry Dunant on the battlefield of Solferino. IHL even expressly permits the civilian population and aid societies to collect and care for the wounded, sick and shipwrecked on their own initiative and, if they do so in response to appeals by the belligerents, entitles them to protection and support from all parties to the conflict.<sup>347</sup> Without official assignment and supervision, however, they cannot be regarded as medical personnel within the meaning of IHL.

**(d) Religious personnel**

According to Additional Protocol I, the term “religious personnel” refers to military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and who are permanently or temporarily attached to the armed forces, civil defence organizations, medical units or medical transports of a party to a conflict, or to medical units or transports seconded to a party to a conflict by neutral States or humanitarian organizations.<sup>348</sup> Thus, in order to qualify as religious personnel within the meaning of IHL, the persons concerned must be exclusively devoted to their ministry and may not fulfill any other functions, regardless of the religion to which they belong. They do not have to be incorporated in the armed forces and can therefore retain their civilian status, but they must necessarily be attached to a military, civil defence or medical service officially recognized and authorized by a belligerent party.

## 2. Protection

**(a) Duty to respect and protect**

Personnel exclusively assigned to medical and religious duties must be respected and protected in all circumstances.<sup>349</sup> This means that medical and religious personnel may not be directly attacked, threatened or hindered in

<sup>346</sup> GC I, Art. 27; AP I, Arts 8(c)(iii) and 9(2).

<sup>347</sup> GC I, Art. 18; GC II, Art. 21; AP I, Art. 17; CIHL, commentary on Rule 109.

<sup>348</sup> AP I, Art. 8(d).

<sup>349</sup> GC I, Arts 24 and 25; GC II, Arts 36 and 37; AP I, Art. 15(1); CIHL, Rules 25 and 27.

their activities, but also that they and their particular role must be actively protected and supported by the belligerents. The duty to respect and protect medical and religious personnel is not a personal privilege but a derivative of the protection afforded to the wounded, the sick and the shipwrecked. Therefore, medical and religious personnel lose their special protection pursuant to the same principles as medical units, namely if they commit, outside their humanitarian function, acts harmful to the enemy.<sup>350</sup>

→ On the loss of protection due to acts harmful to the enemy, see Section III.1.c. below.

### **(b) Status upon capture**

Medical and religious personnel who have fallen into the hands of an adverse party are not to be regarded as prisoners of war irrespective of whether they are civilians or members of the armed forces.<sup>351</sup> Medical and religious personnel of enemy nationality may be retained to the extent required to meet the medical and spiritual needs of prisoners of war, but must be released as soon as their services are no longer indispensable for that purpose.<sup>352</sup> As long as they are retained, such personnel are entitled, as a minimum, to the same benefits and protection as prisoners of war. Personnel seconded by neutral States or international organizations may not be detained and must be released as soon as a route for their return is open and military considerations permit.<sup>353</sup>

### **(c) Duty to provide help and assistance**

To fulfil their important humanitarian mission, medical and religious personnel need more than special respect and protection; they must also be provided with all the support and assistance they may require in the circumstances at hand. This is particularly important in the case of civilian medical personnel, who do not automatically benefit from the operational and logistical support of the armed forces, especially in areas where existing civilian medical services have been disrupted by combat activity. Additional Protocol I thus expressly obliges belligerent parties, if needed, to afford civilian medical personnel operating in such areas “all available help.”<sup>354</sup> It is clear that, in a combat zone, this obligation must be limited to what can reasonably be expected from a belligerent considering the circumstances prevailing on the battlefield. By contrast, in occupied territories, where the occupying power already exercises effective control, civilian medical personnel must be afforded “every assistance” to enable

350 GC I, Art. 21; AP I, Art. 13; CIHL, Rules 25 and 27.

351 GC I, Art. 28(2). This applies to persons covered by GC I, Arts 24 and 26. See also Chapter 5.I.2.

352 GC I, Arts 28(1) and (3) and 30(1); GC II, Art. 37.

353 GC I, Art. 32; GC II, Art. 33(1); AP I, Art. 9(2).

354 AP I, Art. 15(2).

them to perform their humanitarian functions to the best of their ability.<sup>355</sup> In any case, subject to the supervisory and safety measures that the relevant party to a conflict may deem necessary, IHL requires that civilian medical personnel be granted access to any place where their services are essential.<sup>356</sup> Given the importance of medical care, it is clear that any supervisory or security measures restricting access for civilian medical personnel to the wounded, the sick and the shipwrecked must be carefully considered and, wherever possible, accompanied by measures alleviating the humanitarian consequences of such restrictions. For example, in a medical emergency, a belligerent party may have to delay the interrogation of a wounded or sick person in order to allow evacuation or treatment as required by his or her medical condition.

#### (d) Protection of medical ethics

In situations of armed conflict, belligerent parties may be tempted to influence and exploit the work of medical personnel for political, military or other purposes outside their humanitarian mission. Additional Protocol I therefore emphasizes that no one may be prevented from performing acts required by the rules of medical ethics or punished for having done so. Likewise, persons engaged in medical activities may not be compelled to violate the rules of medical ethics, for example by giving priority to the treatment of any person except on medical grounds, or by carrying out any other tasks that are not compatible with their humanitarian mission.<sup>357</sup> Additional Protocol I also protects the confidentiality of medical information. Accordingly, persons engaged in medical activities may not be compelled to give any information concerning the wounded and sick under their care, if such information would, in their opinion, prove harmful to the patients concerned or to their families. It should be noted, however, that this prohibition remains subject to the obligations that medical personnel may have towards their own belligerent party under national law, and to regulations for the compulsory notification of communicable diseases.<sup>358</sup>

#### To go further (Medical and religious personnel)<sup>359</sup>

- *Health-care workers must not be attacked*, film, ICRC, 2011. Available at: <http://www.youtube.com/watch?v=Gh60NQT3qo>
- ICRC, *Health Care in Danger: The Responsibilities of Health-Care Personnel Working in Armed Conflicts and Other Emergencies*, ICRC, Geneva, 2012, 104 pp.

355 AP I, Art. 15 (3).

356 AP I, Art. 15 (4).

357 AP I, Arts 15 (3) and 16 (1) and (2); CIHL, Rule 26.

358 AP I, Art. 16 (3).

359 All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

- Ryan Goodman and Mindy Jane Roseman (eds), *Interrogations, Forced Feedings, and the Role of Health Professionals: New Perspectives on International Human Rights, Humanitarian Law and Ethics*, Harvard University Press, 2009, 228 pp.
- Laurent Gisel, “[Can the incidental killing of military doctors never be excessive?](#),” *IRRC*, Vol. 95, No. 889, Spring 2013, pp. 215–230.
- Vivienne Nathanson, “[Medical ethics in peacetime and wartime: The case for a better understanding](#),” *IRRC*, Vol. 95, No. 889, Spring 2013, pp. 189–213.
- Jean Pictet, “[The medical profession and international humanitarian law](#),” *IRRC*, Vol. 25, No. 247, July 1985, pp. 191–209.
- Christian Enemark, “Triage, treatment and torture: Ethical challenges for US military medicine in Iraq,” *Journal of Military Ethics*, Vol. 7, Issue 3, 2008, pp. 186–201.
- *Conditions for Recognition of National Societies*, ICRC, 2005. Available at: <http://www.icrc.org/eng/resources/documents/misc/6erk5h.htm>
- World Medical Association, *Regulations in Times of Armed Conflict and Other Situations of Violence*. Available at: <http://www.wma.net/en/30publications/10policies/a20/index.html.pdf?print-media-type&footer-right=%5B-page%5D/%5BtoPage%5D>

### ***How Does Law Protect in War?***

- Case No. 186, [Iraq, Medical Ethics in Detention](#)
- Case No. 187, [Iraq, Care for Wounded Enemies](#)

## **III. MEDICAL UNITS AND TRANSPORTS**

### **1. Protection of medical units**

#### **(a) Definition of “medical units”**

In safeguarding the medical mission for the benefit of the wounded, the sick and the shipwrecked, IHL protects not only medical and religious personnel, but also medical facilities, transports, equipment and supplies used for medical purposes. Originally, medical units were protected only if they were attached to the medical services of the armed forces, or if they qualified as civilian hospitals.<sup>360</sup> Additional Protocol I subsequently expanded the term

<sup>360</sup> GC I, Art. 19(1); GC IV, Art.18(1).



“medical units” to include all establishments and other units, whether military or civilian, fixed or mobile, permanent or temporary, that meet two criteria:

- they must be organized for medical purposes, namely the search for, collection, transportation, diagnosis or treatment of the wounded, sick and shipwrecked, or for the prevention of disease;
- they must be exclusively assigned to such purposes by a party to the conflict.

This definition includes, for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units.<sup>361</sup>

### **(b) Scope of protection**

Military medical units, and civilian medical units recognized and authorized by one of the belligerent parties, must be respected and protected at all times. They may be neither directly attacked nor used to shield military objectives from attacks. In order to avoid incidental harm to medical units, the belligerent parties should endeavour to locate such units at a safe distance from military objectives, and to notify each other of their location. Failure to do so, however, does not exempt the adverse party from its duty to respect and protect medical units.<sup>362</sup> Should military medical units fall into the power of the adverse party, their personnel must be permitted to pursue their duties until the capturing party itself ensures the necessary care of the wounded and sick found in such establishments and units.<sup>363</sup> Moreover, their premises, material and stores may not be diverted from their purpose as long as they are required for the care of the wounded and sick irrespective of their allegiance.<sup>364</sup> Should civilian medical units fall into the power of the enemy, which is conceivable particularly in cases of belligerent occupation, the occupying power may not requisition their resources as long as they are needed for the civilian population and for the wounded and sick already under treatment.<sup>365</sup> Even if this should not be the case, such requisitions are permissible only to the extent and for such time as they are required for the immediate medical treatment of wounded and sick members of the armed forces, including prisoners of war.<sup>366</sup> In any case, the occupying power remains responsible for ensuring that the medical needs of the civilian population continue to be satisfied.<sup>367</sup>

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361 AP I, Art. 8(e) and (k).

362 GC I, Art. 19; GC IV, Art. 18; AP I, Art. 12; CIHL, Rule 28.

363 GC I, Arts 19(1), 33(2) and 35(2).

364 GC I, Art. 33(2).

365 AP I, Art. 14(2).

366 AP I, Art. 14(3).

367 AP I, Art. 14(1).



Z. Burduli/ICRC

Puttumatalan, Sri Lanka, 2009. An ICRC team evacuates wounded civilians by ferry to Trincomalee.

### (c) Loss of protection due to acts harmful to the enemy

The special protection of medical units ceases when they are used to commit, outside their humanitarian function, acts harmful to the enemy.<sup>368</sup> Treaty IHL does not define “acts harmful to the enemy,” but it is clear that such acts do not necessarily have to involve offensive combat action. According to the Commentary on the Geneva Conventions, hiding able-bodied combatants, arms or munitions, deliberately impeding military action, or serving as a military observation post are sufficient cause to lose special protection.<sup>369</sup> On the other hand, treaty IHL also provides a non-exhaustive list of examples of conduct or circumstances that may not be regarded as acts harmful to the enemy, namely:

- that the personnel of the unit are armed with light individual weapons, and that they use such weapons for their own defence or for that of the wounded and sick in their charge;
- that the unit is guarded by a picket, by sentries or by an escort;
- that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units;
- that members of the armed forces or other combatants are in the unit for medical reasons;

<sup>368</sup> GC I, Art. 21; GC IV, Art. 19(1); AP I, Art. 13(1); CIHL, Rule 28.

<sup>369</sup> ICRC, *Commentary on the First Geneva Convention*, 2nd ed., 2016, *op. cit.* (note 64), Art. 21.

- that personnel and material of the veterinary service are found in the unit, without forming an integral part thereof;
- that the humanitarian activities of military medical units or of their personnel extend to the care of civilian wounded or sick.<sup>370</sup>

These provisions do not prevent belligerent parties from imposing more restrictive security measures on civilian medical units and personnel operating in territory under their control. For example, an occupying power may legitimately prohibit the carrying of individual weapons throughout the occupied territory. Civilian medical units and personnel found to be operating in violation of such a prohibition may be warned and, if necessary, deprived of their special protection by the occupying power.

For medical units, loss of special protection does not, however, necessarily entail loss of protection against direct attack. If medical units are used to commit acts harmful to the enemy, such as collecting and communicating intelligence unrelated to combat operations, they may lose their special protection as medical units, but they still retain their status as civilian objects. While such medical units are no longer entitled to special support or protected from interference with their work, they remain protected against direct attack unless their use also turns them into military objectives or, in the case of personnel, unless and for such time as their conduct amounts to direct participation in hostilities.<sup>371</sup> Whether this is the case must be determined separately for each situation. In certain circumstances, misusing the protection granted to medical units in order to engage in hostilities may also amount to perfidy and, therefore, constitute a war crime.<sup>372</sup> In any case, the special protection for medical units, whether civilian or military, does not cease unless a warning has been given and, whenever appropriate, a reasonable time limit has been set and disregarded.<sup>373</sup>

## 2. Protection of medical transports

In practice, the protection of the wounded, the sick and the shipwrecked often depends on the respect and protection afforded to the means of transport used to rescue them, evacuate them from danger zones and take them to hospitals or other medical facilities where they can receive the requisite medical assistance and care. IHL contains numerous detailed provisions regulating the status, rights, duties and protection of the various means of medical transportation in a wide variety of circumstances.

<sup>370</sup> GC I, Art. 22; GC IV, Art. 19(2); AP I, 13(2).

<sup>371</sup> On the definition of military objectives and of direct participation in hostilities, see Chapter 3, Sections II.1.a and I.4.

<sup>372</sup> For the definition of perfidy, see Chapter 3.IV.3.

<sup>373</sup> GC I, Art. 21; GC IV, Art. 19(1); AP I, Art. 13(1).

**(a) Definition of “medical transports”**

The term “medical transports” refers to any means of transportation, whether military or civilian, assigned exclusively to the transportation of the wounded, the sick and the shipwrecked, of medical and religious personnel, and of medical equipment or supplies protected by IHL.<sup>374</sup> Such assignments may be permanent or temporary, and may include means of transportation by land, water or air, such as ambulances, hospital ships and medical aircraft, as long as they are authorized by a belligerent party.<sup>375</sup>

**(b) Scope of protection**

In principle, unless otherwise regulated, all medical transports benefit from the same protection as mobile medical units.<sup>376</sup> Accordingly, all medical transports exclusively assigned to medical transportation must be respected and protected in all circumstances.<sup>377</sup> This means that medical transports may legitimately be searched by belligerent parties, but cannot be directly attacked or arbitrarily obstructed in their humanitarian work. This also means that, in cases of medical emergency and to the maximum extent possible, medical evacuation and treatment must be given priority over legitimate security interests such as search and interrogation. As with medical personnel and medical units, medical transports lose their special protection only if they are being used, outside their humanitarian function, to commit acts harmful to the enemy. Thus, for example, an ambulance used for the military deployment of combatants, weapons and ammunition, or for collecting and communicating military intelligence, would certainly lose its special protection under IHL and may even become a military objective subject to lawful attack. On the other hand, an ambulance may not be deprived of its special protection simply because its personnel carry light weapons for the purpose of defending themselves or the patients being transported, or because it is found carrying small arms and ammunition taken from wounded and sick passengers. Here, too, the loss of the special protection afforded to medical transports does not necessarily entail loss of protection against direct attack. For example, the deliberate use of ambulances to hamper crowd-control measures taken by occupying forces against rioting civilians may entail loss of the special protection afforded to medical transports, but would not be sufficient to turn such ambulances into military objectives. Consequently, such ambulances may be lawfully seized or otherwise interfered with, but remain civilian objects protected against direct attack.

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374 AP I, Art. 8(f).

375 AP I, Art. 8(g)-(j).

376 GC I, Art. 35; AP I, Arts 21 and 23.

377 GC I, Art. 35; GC IV, Art. 21; AP I, Arts 21 and 23; CIHL, Rule 29.

### (c) Hospital ships and coastal rescue craft

*Hospital ships* are ships built or equipped specially and solely with a view to assisting, treating and transporting the wounded, the sick and the shipwrecked. They may be military or civilian, and can carry military or civilian patients, but must belong to, be commissioned by, or be seconded to a belligerent party.<sup>378</sup> Hospital ships that are duly notified and distinctively marked as such may be inspected and searched by the belligerent parties, but must be respected and protected at all times. In particular, unlike medical units and other means of medical transportation, hospital ships may not be captured or requisitioned by the enemy.<sup>379</sup> While warships may demand that hospital ships hand over wounded, sick and shipwrecked military personnel, civilian patients may not be surrendered except to their country of origin.<sup>380</sup> Hospital ships must assist the wounded, the sick and the shipwrecked without distinction of nationality or allegiance. They may not hamper the movements of belligerents and may not be used for any military purpose.<sup>381</sup> When hospital ships are used to commit, outside their humanitarian duties, acts harmful to the enemy, they lose their special protection after a warning – coupled, in appropriate circumstances, with a time limit – has been disregarded.<sup>382</sup>

In principle, *coastal rescue craft* operated by belligerent parties or by officially recognized lifeboat institutions enjoy the same protection as hospital ships. Given that the systematic notification and reliable identification of such small and fast-moving vessels may not always be possible in practice, their entitlement to protection does not depend on their prior notification to the enemy. At the same time, however, their entitlement to protection is also not absolute but applies only “so far as operational requirements permit.”<sup>383</sup>

### (d) Medical aircraft

Another noteworthy special regime under IHL applies to medical aircraft. Treaty IHL defines medical aircraft as military or civilian aircraft that are exclusively assigned to medical transport under the authority of a belligerent party, whether permanently or temporarily. They must be marked with the distinctive emblem on their lower, upper and lateral surfaces. Under the 1949 Geneva Conventions, medical aircraft must be respected and may not be attacked as long as they fly at altitudes, times and on routes specifically agreed upon between the belligerents.<sup>384</sup> Additional Protocol I further

378 GC II, Arts 22, 2(1) and 25; AP I, Art. 22(2).

379 GC II, Arts 22, 24 and 25.

380 GC II, Art. 14; AP I, Art. 22(1).

381 GC II, Art. 30(1)–(3).

382 GC II, Art. 34.

383 GC II, Art. 27; AP I, Art. 22(3).

384 GC I, Arts 36–37; GC II, Arts 39–40; GC IV, Art. 22.



ICRC

Field hospital 50 km west of Sirte, Libya, 2011. A wounded patient being carried into a helicopter for transport to hospital in Tripoli.

develops that position and provides that medical aircraft that are recognized as such, but that operate in the absence of or in deviation from an agreement between the belligerent parties, must nevertheless be respected or, in the case of unauthorized flights over enemy-controlled areas, must be given reasonable time for compliance before they may be attacked. In particular, belligerent parties may order medical aircraft to land or alight on water for immediate inspection. Inspected aircraft and their occupants must be authorized to continue their flight without delay if the inspection shows that they qualify as medical aircraft and have not been used in deviation of their strictly medical function under IHL or of their duties under an applicable agreement between the belligerent parties. Should the inspection result in proof to the contrary, the aircraft concerned may be seized and their occupants held or otherwise treated in accordance with their status under IHL.<sup>385</sup>

385 AP I, Arts 24–28.

### To go further (Medical units and transports)<sup>386</sup>

- *Health Care in Danger: Libya*, film, ICRC, 2011. Available at: <http://www.youtube.com/watch?v=nh4z8o6xUN0>
- Antonio Cassese, “Under what conditions may belligerents be acquitted of the crime of attacking an ambulance?,” *Journal of International Criminal Justice*, Vol. 6, No. 2, 2008, pp. 385–397.
- Jann Kleffner, “Protection of the wounded, sick and shipwrecked,” in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford, 2013, pp. 334–338.
- *Ambulance and Pre-Hospital Services in Risk Situations*, Norwegian Red Cross, Mexican Red Cross and ICRC, 2013.

### How Does Law Protect in War?

- Case No. 146, [Lebanon, Helicopter Attack on Ambulances](#)

## IV. HOSPITAL, SAFETY AND NEUTRALIZED ZONES

IHL governing international armed conflicts provides for the establishment, always with the agreement of all the belligerents involved, of special zones and localities for the protection of the wounded, the sick and other particularly vulnerable groups from the effects of war. In essence, there are two types of zones or localities: *hospital and safety zones*, which should be at a safe distance from the hostilities, and *neutralized zones*, which aim to provide protection and shelter in the combat area itself. While this distinction may be useful as a matter of concept, it does not prevent belligerent parties from agreeing on combined, modified or alternative places of refuge that better meet the requirements of the specific context or situation. The belligerent parties can also agree on the establishment of demilitarized zones or declare certain inhabited places as non-defended localities. In both cases, the focus is not necessarily on the wounded and sick, but on the protection of the civilian population in general. Non-defended localities and demilitarized zones are discussed in Chapter 3.II.3.

### 1. Hospital and safety zones and localities

*Hospital zones and localities* are organized specifically with the aim of protecting the wounded and sick from the effects of war. Also protected are personnel entrusted with the organization and administration of such zones and localities and with the care of the wounded and sick. *Safety zones*

386 All ICRC documents available at: [www.icrc.org](http://www.icrc.org)



*and localities* extend the same protection to particularly vulnerable groups within the civilian population, namely aged persons, children under 15, expectant mothers and mothers of children under seven.<sup>387</sup> Hospital and safety zones and localities can also be combined. They can be established before or during an armed conflict, whether in national or in occupied territory, but should be located at a safe distance from the combat zone and preferably be permanent in nature. In this context, the term “locality” refers to specific, well-delimited places, such as buildings or camps, whereas the term “zone” refers to a relatively large area and may include one or several localities. Treaty IHL expressly invites the Protecting Powers and the ICRC to lend their good offices in order to facilitate the institution and recognition of hospital zones and localities, and provides a draft agreement – in an annex to the First and Fourth Geneva Conventions – for their mutual recognition by the belligerent parties.<sup>388</sup>

## 2. Neutralized zones

Neutralized zones are generally temporary in nature and are established in the actual combat zone to protect the wounded, the sick and peaceful civilians from the dangers arising from the surrounding hostilities. The establishment of a neutralized zone may be initiated by the belligerent parties themselves, but may also be proposed by the ICRC based on its general right of humanitarian initiative.<sup>389</sup> Such neutralized zones should be open, without adverse distinction, to all military or civilian persons who are wounded or sick and, additionally, to all civilians who do not take part in the hostilities and who, while they reside in the zones, do not perform any work of a military character. The belligerent parties should agree in writing on the geographical position, administration, food supply and supervision of the proposed neutralized zone, and on the beginning and duration of the neutralization.<sup>390</sup>

## 3. Protection

While the 1949 Geneva Conventions do not expressly specify the scope of protection afforded to hospital, safety or neutralized zones and localities, it is generally accepted that attacks against such zones are prohibited under customary IHL.<sup>391</sup> This conclusion is supported by the fact that, under the Rome Statute, intentional attacks against hospitals and places where the sick and wounded are collected constitute a serious violation of the laws

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387 On the terminology used in this context, see J.S. Pictet (ed.), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Vol. IV of *The Geneva Conventions of 12 August 1949: Commentary*, ICRC, Geneva, 1958, p. 120.

388 GC I, Art. 23 and Annex I; GC IV, Art. 14 and Annex I.

389 On the ICRC's right of initiative, see Chapter 8.II.6.

390 GC IV, Art. 15.

391 CIHL, Rule 35.



and customs of war, unless the targeted localities qualify as military objectives.<sup>392</sup> A prohibition against attacks, and a stipulation on the general duty of belligerents to respect and protect hospital and safety zones at all times, are also included in the draft agreements annexed to the First and Fourth Geneva Conventions.<sup>393</sup>

### To go further (Hospital, safety and neutralized zones)<sup>394</sup>

- Jean-Philippe Lavoyer, “International humanitarian law, protected zones and the use of force,” in Wolfgang Biermann and Martin Vadset (eds), *UN Peacekeeping in Trouble: Lessons Learned from the former Yugoslavia*, Ashgate, Aldershot, 1998, pp. 262–279.

### How Does Law Protect in War?

- Case No. 205, [Bosnia and Herzegovina, Constitution of Safe Areas](#)

## V. THE DISTINCTIVE EMBLEMS



The emblems of the red cross, the red crescent and the red crystal

### 1. Three distinctive emblems

The distinctive emblems of the Geneva Conventions and their Additional Protocols are the red cross, the red crescent and the red crystal on a white ground.<sup>395</sup> Another emblem recognized in the 1949 Geneva Conventions, the red lion and sun, has not been used since the only State that ever employed it, the Islamic Republic of Iran, replaced it by the red crescent in 1980. All three emblems may be used for the same purposes and under the same conditions, and enjoy equal status and respect under IHL.

<sup>392</sup> Rome Statute, Art. 8(2)(b)(ix). For the definition of military objectives, see Chapter 3.II.1.a.

<sup>393</sup> GC I and IV, Annex I, Art. 11.

<sup>394</sup> All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

<sup>395</sup> The distinctive emblems of the red cross and red crescent (and of the red lion and sun) have long been recognized in treaty IHL (GC I, Art. 38 and GC II, Art. 41). Additional Protocol III, which entered into force on 14 January 2007, additionally recognized the red crystal as a distinctive emblem with equal status.

## 2. Protective use by medical personnel, units and transports

The original and principal purpose of the distinctive emblems is to provide a visible sign of the protection to which medical personnel and objects are entitled. The protective use of the distinctive emblems is restricted to medical units and transports, and to medical and religious personnel, equipment and supplies within the meaning of IHL.<sup>396</sup> Moreover, such protective use must always be authorized and supervised by the belligerent party concerned. With the agreement of the States involved, the protective use of the distinctive emblems is also permitted for hospital and safety zones and localities established pursuant to the 1949 Geneva Conventions,<sup>397</sup> and for medical and religious personnel operating under the auspices of the UN.<sup>398</sup>

Each belligerent party must endeavour to ensure that its medical personnel, units and transports are identifiable and take measures to facilitate their recognition.<sup>399</sup> As a general rule, medical and religious personnel must wear an armlet displaying the distinctive emblem, and medical units and transports must fly distinctive flags or otherwise display the distinctive emblem.<sup>400</sup> In order to be effective as a protective sign, the emblem must be comparatively large in proportion to the protected object and visible to the enemy even at a considerable distance. Where visible identification is not sufficient, for example owing to the means and methods of warfare employed, the belligerent parties may additionally or alternatively resort to other means of identification, such as distinctive light or radio signals or electronic means of identification.<sup>401</sup> It is important to note, however, that the distinctive emblems and other means of identification do not, of themselves, confer protected status but merely aim to facilitate the identification or recognition of persons and objects entitled to protection under IHL.<sup>402</sup> The failure or inability of medical and religious personnel, or of medical units and transports, to display the distinctive emblem may therefore render their recognition more difficult, but does not deprive them of their protected status.<sup>403</sup>

## 3. Indicative use by National Societies

The distinctive emblems may also be used as a purely indicative sign, namely to identify persons, equipment and activities that are affiliated to the National Societies and act in conformity with the Movement's

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396 GC I, Art. 44(1).

397 GC I and IV, Annex I, Art. 6.

398 AP III, Art. 5.

399 GC I, Art. 39; GC II, Art. 41; AP I, Art. 18(1) and (2).

400 GC I, Arts 40–43; GC II, Arts 42–43; GC IV, Arts 20(2), 21 and 22(2); AP I, Art. 18(3) and (4).

401 AP I, Art. 18(5) and (6), and Annex I, Chapter III.

402 AP I, Annex I, Art. 1(2); AP III, Preamble, para. 4.

403 ICRC, *Commentary on the First Geneva Convention*, 2nd ed., 2016, *op. cit.* (note 64), Art. 39; CIHL, commentary on Rule 30.

Fundamental Principles.<sup>404</sup> Such indicative use must be in compliance with national legislation and does not imply any particular protection under IHL other than the general protection against direct attack flowing from the civilian status of such personnel and their equipment. As a purely indicative sign, the distinctive emblem should be small in proportion to the person or object carrying it and, during an armed conflict, the conditions under which it is used must preclude all risk of confusion with the protective sign affording immunity against direct military attack. In practice, indicative signs are most commonly combined with the logo of the National Society concerned. Exceptionally, and only in peacetime, the purely indicative use of the distinctive emblems may also be permitted for ambulances and aid stations providing free medical treatment. Such use must be based on national legislation, must be expressly permitted by the National Society of the country concerned, and must imperatively stop on the outbreak of an international armed conflict.<sup>405</sup>

→ On the Movement's Fundamental Principles, see Chapter 8.I.3.

#### 4. Use by international Red Cross organizations

International Red Cross organizations, namely the ICRC and the International Federation, may use the emblem of the red cross at all times and for all their activities without reservation. Both organizations use the red cross emblem as part of their logos. Even during armed conflict, their use of the emblem is mostly indicative in nature and merely serves to identify personnel, premises, material and activities affiliated to the organization in question. When circumstances and the nature of the work require, however, the ICRC and the International Federation are also authorized to make protective use of the red cross emblem.<sup>406</sup> In areas affected by hostilities, the ICRC uses large-sized emblems for protective purposes on flags or tabards, to mark personnel, or on vehicles, ships, aircraft and buildings. Moreover, the ICRC has a long-standing and broadly accepted practice of using its logo for protective purposes instead of the distinctive emblem of the red cross on a white ground.<sup>407</sup>

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404 GC I, Art. 44(2).

405 GC I, Art. 44(4).

406 ICRC, *Commentary on the First Geneva Convention*, 2nd ed., 2016, *op.cit.* (note 64), Art. 44.

407 ICRC, *Study on Operational and Commercial and other Non-Operational Issues Involving the Use of the Emblems*, CD/07/7.2.2, Council of Delegates of the International Red Cross and Red Crescent Movement, Geneva, 23–24 November 2007, p. 83. Available at: [http://www.icrc.org/eng/assets/files/other/cd07\\_7-2-2\\_eng\\_long\\_emblemstudy\\_final\\_20nov07.pdf](http://www.icrc.org/eng/assets/files/other/cd07_7-2-2_eng_long_emblemstudy_final_20nov07.pdf)



# ICRC

Logo of the ICRC



## International Federation of Red Cross and Red Crescent Societies

Logo of the International Federation

### 5. Repression of misuse

In practice, the protective value and credibility enjoyed by the distinctive emblems depend on the proper conduct of those authorized to use them and on effective prevention of their misuse. In view of the high credibility and protective value enjoyed by the distinctive emblems in practice, effective prevention of misuse of the emblems is of paramount importance. Accordingly, IHL prohibits any improper use of the distinctive emblems, signs and signals provided for in the 1949 Geneva Conventions and their Additional Protocols.<sup>408</sup> Depending on the circumstances, deliberate misuse of a distinctive emblem can even amount to perfidy and, thereby, to a war crime.<sup>409</sup> Any imitation or use of the distinctive emblems for private or commercial purposes, irrespective of the underlying motive, is also prohibited.<sup>410</sup> States have a legal duty to ensure that their national legislation regulates the use of the distinctive emblems consistent with the 1949 Geneva Conventions and their Additional Protocols, including provisions ensuring effective prevention and punishment of any misuse.<sup>411</sup> The ICRC has published a Model Law Concerning the Emblem, which aims to provide governments with useful guidance and support in this matter.<sup>412</sup>

408 Hague Regulations, Art. 23(f); GC I, Art. 53; AP I, Art. 38(1); CIHL, Rule 59.

409 AP I, Arts 37(1)(d) and 85(3)(f). On perfidy, see Chapter 3.IV.3.

410 GC I, Art. 53(1).

411 GC I, Art. 54; GC II, Art. 45.

412 M. Sassòli, A. Bouvier and A. Quintin, *How Does Law Protect in War?*, *op. cit.* (note 17), Document No. 35, ICRC, Model Law Concerning the Emblem. Available at: <https://www.icrc.org/casebook/doc/case-study/icrc-law-emblem-case-study.htm>

### To go further (The distinctive emblem)<sup>413</sup>

- François Bugnion, *Towards a Comprehensive Solution to the Question of the Emblem*, Geneva, ICRC, 4th ed., 2006.
- François Bugnion, *Red Cross, Red Crescent, Red Crystal*, Geneva, ICRC, May 2007, 120 pp.
- Jean-François Quéguiner, “[Commentary on the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem \(Protocol III\)](#),” *IRRC*, Vol. 89, No. 865, March 2007, pp. 175–207.
- ICRC, *Commentary on the First Geneva Convention*, 2nd ed., ICRC/Cambridge University Press, 2016, Articles 53 and 54.

### How Does Law Protect in War?

- Document No. 8, [The Third Protocol Additional to the Geneva Conventions](#)
- Document No. 35, [ICRC, Model Law Concerning the Emblem](#)
- Case No. 44, [ICRC, The Question of the Emblem](#)
- Case No. 78, [Iran, Renouncing Use of the Red Lion and Sun Emblem](#)
- Case No. 209, [United Kingdom, Misuse of the Emblem](#)
- Case No. 247, [Colombia, Misuse of the Emblem](#)

## VI. THE MISSING AND THE DEAD

### 1. The right of families to know the fate of their relatives

Some of the most painful and yet most common experiences of war are the loss of close relatives and the desperate anxiety of those waiting for news about family members that never comes. In the words of the ICRC:

“Uncertainty about the fate of a relative is a harsh reality for countless families in situations of armed conflict or internal violence around the world. Parents, siblings, spouses and children are desperately seeking lost relatives. Families and communities, not knowing whether their loved ones are alive or dead, are unable to put behind them the violent events that disrupted their lives. Their anxiety continues for years after the fighting ends and peace returns. They cannot move on to rehabilitation and reconciliation, either as

413 All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

individuals or as a community. Such festering wounds can harm the fabric of society and undermine relations between groups and nations, sometimes decades after the original events.<sup>414</sup>

In order to ensure that people who have disappeared or died, for reasons related to an armed conflict, are accounted for, IHL obliges belligerent parties to search for and provide all available information on dead and missing persons, and to ensure that mortal remains and gravesites are treated with respect and that all available information about mortal remains and the location of gravesites is recorded. Treaty IHL even expressly specifies that, in their activities relating to the dead and the missing, all States and humanitarian organizations involved must be guided primarily by the right of families to know the fate of their relatives.<sup>415</sup>

## 2. Obligations with regard to the missing

### (a) Definition of “missing persons”

International law does not expressly define “missing persons.” For the purposes of IHL, the term is generally understood as including all persons, whether civilian or military, whose whereabouts are unknown to their relatives and who, on the basis of reliable information, have been reported missing in connection with an armed conflict.<sup>416</sup>

### (b) Duty to search for and transmit information on the missing

Belligerent parties have an obligation to search for persons reported missing for reasons related to an armed conflict and to take all feasible measures to account for them.<sup>417</sup> Information concerning missing persons and requests for information on them can be exchanged directly between the belligerent parties or transmitted through the Protecting Power, the ICRC’s Central Tracing Agency, or the National Societies. Where such information is not transmitted through the ICRC, the belligerent parties must ensure it is also provided to the Central Tracing Agency.<sup>418</sup>

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414 ICRC, *The Missing: ICRC Progress Report*, ICRC, Geneva, August 2006, p. 1.

415 AP I, Art. 32.

416 Of course, persons can also be missing as a result of situations other than an armed conflict. For a more comprehensive definition, see, e.g., the ICRC Model Law on the Missing (Art. 2), according to which a missing person is “a person whose whereabouts are unknown to his/her relatives and/or who, on the basis of reliable information, has been reported missing in accordance with the national legislation in connection with an international or non-international armed conflict, a situation of internal violence or disturbances, natural catastrophes or any other situation that may require the intervention of a competent State authority”; ICRC Advisory Service on International Humanitarian Law, *Guiding Principles / Model Law on the Missing*, 2009. Available at: <http://www.icrc.org/eng/assets/files/other/model-law-missing-0209-eng-.pdf>

417 AP I, Art. 33(1); CIHL, Rule 117.

418 AP I, Art. 33(3).

### (c) Preventive measures

IHL contains numerous provisions aimed at ensuring that people do not remain unaccounted for, particularly in the event of separation, deprivation of liberty or death.

#### *Separation*

Armed conflict often leads to the separation of family members, particularly in the course of urgent evacuations or other displacements and, for members of armed forces, owing to unexpected military deployments. Moreover, communication between family members living in different places can be interrupted as a result of hostilities, occupation or a general breakdown of infrastructure or power supply. People thus separated are likely to be reported missing unless they have the facilities and means of communication required to inform their families of their whereabouts. A particular problem in this regard is that of unaccompanied children separated from their families while fleeing the fighting, or because they were forcibly recruited, detained or even unlawfully adopted.

Accordingly, IHL stipulates that all persons in territory controlled by a belligerent party must be enabled to exchange news of a strictly personal nature with their family members, wherever they may be, if necessary through an intermediary such as the Central Tracing Agency run by the ICRC.<sup>419</sup> Moreover, belligerent parties must facilitate enquiries made by members of dispersed families with a view to re-establishing family links and, if possible, to reunification. In particular, they must encourage the work of international organizations specialized in this area, such as the ICRC.<sup>420</sup> Belligerent parties must also ensure that orphaned or otherwise unaccompanied children under 15 are not left to fend for themselves,<sup>421</sup> that all children under the age of 12 are equipped with identity discs or similar means,<sup>422</sup> and that children evacuated to neutral countries for the duration of the conflict are duly identified and notified to the ICRC's Central Tracing Agency.<sup>423</sup>

#### *Deprivation of liberty*

Persons deprived of their liberty, particularly if held in solitary confinement or in a secret place of detention, are likely to be reported missing if they are not permitted to communicate with the world outside and if their detention, and any subsequent transfer, death or release, are not adequately recorded,

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419 GC IV, Art. 25.

420 GC IV, Art. 26.

421 GC IV, Art. 24(1).

422 GC IV, Art. 24(3).

423 API, Art. 78.

registered and notified.<sup>424</sup> IHL therefore obliges the detaining power to forward information on any captured, detained, wounded, sick or shipwrecked persons who have fallen into its power to their families and authorities. In particular, the detaining power must *formally notify* the detention of each protected person, as well as any transfer, release or death, to his or her country of origin or residence,<sup>425</sup> forward a *capture or internment card* for each detainee to the family and the Central Tracing Agency,<sup>426</sup> and *respond to all enquiries* about protected persons, except where this may be detrimental to the persons concerned or their families.<sup>427</sup> Throughout their detention or internment, persons deprived of their liberty also have the *right to correspond with their family*.<sup>428</sup> In practice, a very powerful means of preventing persons deprived of their liberty from remaining unaccounted for is the ICRC's right to conduct visits to prisoners of war and civilians interned or detained for reasons related to an armed conflict.<sup>429</sup> During its visits, the ICRC strives to ensure not only that all detainees benefit from humane treatment and adequate conditions of detention, but also that the identities of all detainees are recorded and communicated to their next-of-kin along with Red Cross messages containing family news.

### **Death**

Persons killed for reasons related to an armed conflict are likely to be reported missing if the necessary measures are not taken to search for them, to collect and identify their remains and to notify the appropriate authorities. Thus, members of armed forces are more likely to be “missing in action” if they do not carry identity discs or equivalent means of identification as required by IHL.<sup>430</sup> Civilians who are killed in an armed conflict, whether in the course of the hostilities or for other reasons, are less likely to have identification documents on them and often remain unaccounted for if their bodies are abandoned, hastily buried, or even burned. Their successful identification therefore largely depends on whether their mortal

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424 In addition, Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, defines “enforced disappearance” as “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”

425 GC I, Art. 16; GC II, Art. 19; GC III, Arts 122 and 123; GC IV, Arts 136–138 and 140; AP I, Art. 33(2); CIHL, Rule 123.

426 GC III, Art. 70; GC IV, Art. 106.

427 GC III, Art. 122(7); GC IV, Art. 137(1) and (2).

428 GC III, Art. 71; GC IV, Art. 107; CIHL, Rule 125.

429 GC III, Art. 126; GC IV, Art. 143; CIHL, Rule 124(A).

430 GC III, Art. 17(3).



remains are carefully examined and buried in properly marked graves, as discussed in the next section.

### 3. Obligations with regard to the dead

#### (a) Search for and recovery of the dead

Parties to a conflict must, at all times, and particularly after an engagement, take all possible measures to search for the dead and collect and evacuate their remains without delay and without distinction.<sup>431</sup> In particular, they are encouraged to agree on the deployment of search teams, which must be respected and protected while employed exclusively for that purpose.<sup>432</sup>

#### (b) Identification and forwarding of information

It would not be realistic to expect belligerent parties to systematically identify every single person killed in the context of an armed conflict. Nevertheless, they have a legal duty to record any information that is available to them and that may help identify the dead bodies in their possession.<sup>433</sup> All information so collected, along with death certificates or duly authenticated lists of the dead, must be forwarded to the adverse party through the intermediary of the National Information Bureau and the ICRC's Central Tracing Agency.<sup>434</sup> The belligerents must also forward one half of every double identity disc, last wills, money or any other documents and articles of an intrinsic or sentimental value found on the dead.<sup>435</sup>

#### (c) Decent burial and marking of graves

Parties to a conflict must take all possible measures to ensure that the remains of the deceased are respected and that they are neither mutilated nor pillaged or despoiled.<sup>436</sup> Burials, whether on land or at sea, must be preceded by a careful examination of the bodies, with a view to confirming death, enabling a report to be made and, where necessary, establishing the identity of the deceased. Where available, one half of the double identity disc should remain on the body to facilitate identification in case of subsequent exhumation. In all cases, the dead must be honourably interred, if possible according to the rites of their religion. Bodies may not be cremated except for imperative reasons of hygiene or if required by the religion of the

431 GC I, Art. 15(1); GC II, Art. 18(1); GC IV, Art. 16(2); CIHL, Rule 112.

432 AP I, Art. 33(4).

433 GC I, Art. 16; GC II, Art. 19; AP I, Art. 33(2); CIHL, Rule 116.

434 For further information on the ICRC's forensic activities, see ICRC, "Forensic Science and Humanitarian Action," ICRC webpage, available at: <http://www.icrc.org/eng/what-we-do/forensic/index.jsp>

435 GC I, Art. 16(4); GC II, Art. 19(4); GC IV, Art. 129; CIHL, Rule 114.

436 GC I, Art. 15; GC II, Art. 18; GC IV, Art. 16; AP I, Art. 34(1); CIHL, Rule 113.

deceased.<sup>437</sup> Gravesites and individual graves must be respected, properly maintained and marked so that they can always be found. In order to facilitate subsequent exhumations and to ensure the identification of bodies and their possible transportation to the home country, belligerent parties are required to establish an official graves registration service at the outset of every armed conflict.<sup>438</sup>

**(d) Repatriation of mortal remains**

At the request of the home country or the families of the deceased, the State in whose territory the graves are situated must facilitate the repatriation of mortal remains and of personal effects found on the bodies.<sup>439</sup> The belligerents should also conclude agreements in order to facilitate access to the gravesites for relatives of the deceased and for representatives of official graves registration services.<sup>440</sup> Where mortal remains are not repatriated, the graves can be maintained at the expense of the country of origin or, after a period of five years, become subject to the relevant laws of the territorial State relating to cemeteries and graves.<sup>441</sup> In any case, the territorial State may not exhume the remains of the deceased except for the purposes of repatriation to their home country or in case of overriding public necessity, including cases of medical and investigative necessity. In all cases of exhumation, the home country must be notified and the mortal remains treated with respect.<sup>442</sup>

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437 GC I, Art. 17; GC II, Art. 20; GC III, Art. 120(3)-(5); GC IV, Art. 130(1) and (2); CIHL, Rule 115.

438 GC I, Art. 17; GC III, Art. 120(6); GC IV, Art. 130(3); AP I, Art. 34(1); CIHL, Rule 116.

439 AP I, Art. 34(2)(c); CIHL, Rule 114.

440 AP I, Art. 34(2)(a).

441 AP I, Art. 34(3).

442 AP I, Art. 34(4).

## Textbox 6: National Information Bureaux and the Central Tracing Agency

### National Information Bureaux<sup>443</sup>

In international armed conflicts, each party to the conflict must establish a National Information Bureau with the following tasks:

- to centralize all information on the dead, the wounded, the sick, the shipwrecked, prisoners of war and other protected persons deprived of their liberty, and children whose identity is in doubt, and to provide this information to the appropriate authorities via the Protecting Power and the ICRC's Central Tracing Agency;
- to receive and respond to all requests for information on the fate of such persons via the Protecting Power and the Central Tracing Agency.

### Central Tracing Agency<sup>444</sup>

The primary purpose of the Central Tracing Agency, which is run by the ICRC, is to trace missing persons, unaccompanied children and all those who are in the power of the enemy, to notify their country of origin, or allegiance, of their whereabouts and to restore family links ruptured by war.<sup>445</sup> The Agency collects, centralizes and forwards any information that might help to identify and reconnect persons in particular need of protection in both international and non-international armed conflicts. It arranges for the exchange of family correspondence when the usual means of communication have been disrupted, for transfers and repatriations of individuals, and for the reunification of dispersed families. In fulfilling these tasks, the Agency may also issue certain documents, such as temporary travel documents for persons without identity papers and certificates of captivity, hospitalization or death for former detainees, prisoners of war or their rightful claimants. The Agency usually works in close cooperation with the National Societies. Belligerent parties must facilitate its activities to the greatest extent possible.

→ For more information on the Central Tracing Agency, see-Chapter 8.II.3.

443 GC I, Art. 16; GC II, Art. 19; GC III, Art. 122; GC IV, Arts 136–139.

444 GC I, Art. 16; GC II, Art. 19; GC III, Art. 123; GC IV, Art. 140.

445 GC I, Art. 16; GC II, Art. 19; GC III, Art. 123; GC IV, Arts 25 and 140; API, Arts 33(3) and 78(3).

### To go further (The missing and the dead)<sup>446</sup>

- Monique Crettol and Anne-Marie La Rosa, “[The missing and transitional justice: The right to know and the fight against impunity](#),” *IRRC*, Vol. 88, No. 862, June 2006, pp. 355–362.
- “[Missing persons](#),” *IRRC*, No. 848, 2002.
- ICRC, [Operational Best Practices Regarding the Management of Human Remains and Information on the Dead by Non-Specialists](#), ICRC, Geneva, 2005, 53 pp.
- ICRC Advisory Service on International Humanitarian Law, *Missing Persons and their Families: Recommendations for Drafting National Legislation*, 2003. Available at: [http://www.icrc.org/eng/assets/files/other/missing\\_and\\_recommendations\\_missing.pdf](http://www.icrc.org/eng/assets/files/other/missing_and_recommendations_missing.pdf)
- ICRC Advisory Service on International Humanitarian Law, *Guiding Principles / Model Law on the Missing*, 2009. Available at: <http://www.icrc.org/eng/assets/files/other/model-law-missing-0209-eng-.pdf>

### How Does Law Protect in War?

- Document No. 34, [ICRC, Tracing Service](#)
- Case No. 134, [Israel, Evacuation of Bodies in Jenin](#)
- Case No. 206, [Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of Hostilities](#)

## VII. SPECIFIC ISSUES ARISING IN NON-INTERNATIONAL ARMED CONFLICTS

The protection of the wounded, the sick and the shipwrecked, of medical and religious personnel and of medical units and transports is just as important in non-international armed conflicts as it is in international armed conflicts. Common Article 3 requires that the wounded and sick be collected and cared for, and that persons rendered *hors de combat* by sickness or wounds be treated humanely, just like all persons not taking a direct part in hostilities.<sup>447</sup> Additional Protocol II, which develops and supplements the protection provided by common Article 3, contains an entire section with provisions devoted to the protection of the wounded, the sick and the shipwrecked, most of which are recognized as having attained customary status for any situation of non-international armed conflict.

<sup>446</sup> All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

<sup>447</sup> GC I–IV, common Art. 3(1). See Chapters 5 and 6.

### 1. Protection of the wounded, the sick and the shipwrecked

Whenever circumstances permit, and particularly after an engagement, all possible measures must be taken without delay to search for and collect the wounded, the sick and the shipwrecked, to protect them against pillage and ill-treatment, and to ensure that they are adequately cared for.<sup>448</sup> All the wounded, sick and shipwrecked must be respected, protected and treated humanely at all times, regardless of whether or not they have taken part in the armed conflict. They must receive the medical care and attention required by their condition to the fullest extent practicable and with the least possible delay, and without any distinction between them for any reasons other than medical.<sup>449</sup>

### 2. Protection of medical and religious personnel

Medical personnel exclusively assigned to medical duties and religious personnel exclusively assigned to religious duties must be respected and protected at all times and must be granted all available help for the performance of their duties. They lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy.<sup>450</sup>

### 3. Protection of medical ethics

Medical and religious personnel may not be compelled to carry out tasks that are not compatible with their humanitarian mission, or to give priority to any person except on medical grounds.<sup>451</sup> More generally, no person engaged in medical activities may be compelled to perform acts contrary to medical ethics or to rules designed for the benefit of the wounded and sick, nor may anyone be compelled to refrain from acts required by such rules. In no circumstances may any person be punished for carrying out medical activities compatible with medical ethics.<sup>452</sup> Furthermore, as a general rule, the confidentiality of medical information on the wounded and sick and their treatment must be respected, and no person engaged in medical activities may be penalized for refusing or failing to provide such information. Given that most non-international armed conflicts are fought within the jurisdiction of a single State, however, the confidentiality of medical information remains subject to contrary obligations under domestic law.<sup>453</sup>

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448 AP II, Art. 8; CIHL, Rules 109–111.

449 AP II, Art. 7; CIHL, Rule 110.

450 AP II, Art. 9(1); CIHL, Rules 25 and 27.

451 AP II, Art. 9.

452 AP II, Art. 10; CIHL, Rule 26.

453 AP II, Art. 10.

#### 4. Protection of medical units and transports

Medical units and transports exclusively assigned to medical purposes must be respected and protected at all times and may not be directly attacked. They lose their protection only when they are used to commit hostile acts outside their humanitarian function and after a warning setting a reasonable time limit has been disregarded.<sup>454</sup>

#### 5. The distinctive emblem

IHL governing non-international armed conflicts also provides that the distinctive emblems of the red cross, red crescent and red crystal on a white ground must be respected in all circumstances and that any improper use thereof is prohibited. In particular, attacks directed against medical and religious personnel and objects displaying the distinctive emblems of the 1949 Geneva Conventions in conformity with international law are prohibited.<sup>455</sup>

#### 6. The dead and the missing

Whenever circumstances permit, and particularly after an engagement, the belligerent parties must take all possible measures without delay to search for and recover the dead and prevent their bodies from being pillaged or despoiled. Each party to the conflict must, with a view to the identification of the dead, record all available information before disposing of the bodies and mark the location of the graves. The dead must be disposed of in a respectful manner and their graves respected and properly maintained.<sup>456</sup> Each party to the conflict must take all feasible measures to account for persons reported missing as a result of the conflict and must provide their family members with any information it has on their fate.<sup>457</sup>

#### To go further (Specific issues arising in non-international armed conflicts)<sup>458</sup>

- “Syria: Timely access to health-care services a matter of life or death,” ICRC operational update. Available at <http://www.icrc.org/eng/resources/documents/update/2013/03-01-syria-health-care.htm>

454 AP II, Art. 11; CIHL, Rules 28 and 29.

455 AP II, Art. 12; CIHL, Rule 30.

456 AP II, Art. 8; CIHL, Rules 112, 113, 115 and 116.

457 CIHL, Rule 117.

458 All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

### *How Does Law Protect in War?*

- Case No. 194, [Sri Lanka, Jaffna Hospital Zone](#)
- Case No. 196, [Sri Lanka, Conflict in the Vanni](#), paras 17–22

### **Textbox 7: The Health Care in Danger project**

Violence against health-care personnel and facilities, medical transports and patients is one of the most serious humanitarian challenges in contemporary armed conflicts. A study conducted by the ICRC based on data collected in 16 countries from 2008 to 2010 showed the manifold patterns of violence that hinder the delivery of health care, ranging from direct attacks on patients and on medical personnel and facilities – including looting and kidnapping – to arrests and denial of access to health care. For example, urban fighting may prevent health-care personnel from reaching their place of work, first-aiders may be unnecessarily delayed at checkpoints, soldiers may forcibly enter a hospital to look for enemies or shield themselves from attack, and ambulances may be targeted or illegally used to carry out attacks. Whatever the context, poor security conditions in many parts of the world mean that the wounded and sick do not get the medical attention to which they are entitled. This initial study was instrumental in establishing the danger to, and violence perpetrated against, health-care delivery as an issue to be addressed comprehensively rather than on a case-by-case basis. As a consequence, the ICRC began to systematically record violent incidents affecting the delivery of health care. The vast majority of the cases recorded involved violence against local health-care providers, not international humanitarian players. This underscores the importance of cooperation not only between the various components of the Movement, but also between the latter and other relevant stakeholders, such as government health ministries and services, and international and non-governmental organizations with health-related mandates and activities. Accordingly, the Health Care in Danger project was conceived as an ICRC-led Movement initiative aimed at improving the efficiency and delivery of effective and impartial health care in armed conflicts and other emergencies. The project focuses on strengthening protection for the wounded and sick by raising public awareness and advocating the adoption of specific measures designed to help ensure safe access to effective and impartial health care. In doing this, the ICRC and National Societies work with States, non-governmental organizations,

the larger health-care community and other stakeholders to develop and adopt practical measures that can be implemented in the field by decision-makers, humanitarian organizations and health professionals.

- For further details, see ICRC, *Health Care in Danger: A Sixteen-Country Study*, ICRC, Geneva, June 2011. Available at: <https://www.icrc.org/eng/assets/files/reports/4073-002-16-country-study.pdf>
- See also 31st International Conference of the Red Cross and Red Crescent, Resolution 5 – *Health care in danger: Respecting and protecting health care*, 2011. Available at: <https://www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-5-2011.htm>
- See also ICRC, *Health Care in Danger: Making the Case*, ICRC, Geneva, 2011, 24 pp.
- See also “Health Care in Danger: It’s a Matter of Life & Death,” webpage, ICRC. Available at: <http://www.icrc.org/eng/what-we-do/safeguarding-health-care/index.jsp>







# Chapter 5

## Detention and internment



A. Nelson/ICRC

United States internment facility at Guantanamo Bay Naval Station in Cuba, 2014. An ICRC delegate shakes hands with a detainee after giving him a Red Cross message.

## Structure

- I. The relevance of “status” in the context of detention
- II. Internment of prisoners of war
- III. Internment and detention of civilians
- IV. Specific issues arising in non-international armed conflicts

### In a nutshell

- All persons deprived of their liberty for reasons related to an armed conflict must be treated humanely and must be afforded appropriate conditions of detention, the medical care they require, and the judicial or procedural guarantees corresponding to their status.
- Prisoners of war may be interned without any particular judicial or administrative procedure, but must be released and repatriated immediately after the end of active hostilities.
- Other security internees are entitled to a periodic review and must be released as soon as the reasons justifying their internment no longer exist.
- Persons held by non-State armed groups, even if those groups are unable to exercise territorial control, must always be treated humanely and must have their basic needs provided for, at least to the same extent as the group members themselves.

### To go further<sup>459</sup>

- *In Detention: The Human Way*, film, ICRC, 2010. Available at: <https://www.icrc.org/download/video/protection/01052-detention-the-humane-way.wmv>
- ICRC e-learning module, *Protected persons and objects, Chapter V: Prisoners of war and other detainees*. Available at: <http://www.icrcproject.org/elearning/en/ihl/M6/index.html>
- Alain Aeschlimann, “[Protection of detainees: ICRC action behind bars](#),” *IRRC*, Vol. 87, No. 857, March 2005, pp. 83–122.
- “[Detention](#),” *IRRC*, Vol. 87, No. 857, March 2005.

<sup>459</sup> All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

Apart from wounds, sickness and death, situations of armed conflict regularly entail the detention or internment of thousands or even millions of soldiers and civilians by adverse parties. Separated from their families and in the power of hostile authorities, persons deprived of their liberty for reasons related to armed conflict often live in extremely difficult circumstances, exposed to uncertainty, anxiety, tension and, in the worst case, abuse. Some of the grimmest atrocities in the history of warfare were committed against persons detained in the concentration camps of World War II, the rape camps in Bosnia-Herzegovina, and countless other places where prisoners have been tortured, abused and murdered with impunity. It is therefore not surprising that a large portion of IHL is devoted to protecting the lives and dignity of prisoners of war, civilian internees and other persons deprived of their liberty for reasons related to an armed conflict.

## I. THE RELEVANCE OF “STATUS” IN THE CONTEXT OF DETENTION

In the context of detention, personal status under IHL serves to distinguish categories of person that are subject to different regimes in terms of the legal basis for and the conditions of their detention, their treatment, their judicial or procedural rights, the conditions governing their release, and the ICRC's entitlement to conduct visits. In situations of international armed conflict, the two categories of person deprived of their liberty that benefit from a distinct status are prisoners of war and persons protected under the Fourth Geneva Convention. Other persons detained during an armed conflict, international or non-international, do not enjoy any particular status; however, they do benefit from fundamental guarantees ensuring both humane treatment and judicial guarantees or other procedural safeguards.

→ On the relevance of status during the conduct of hostilities, see Chapter 3.I.1.c.

### 1. Combatants

#### (a) Combatant status and privilege

As we saw in Chapter 3, IHL governing international armed conflicts affords combatant status to only two categories of person: (a) members of the armed forces of a party to an international conflict, except medical and religious personnel,<sup>460</sup> and (b) participants in a *levée en masse*.<sup>461</sup> Persons involved in the

460 AP I, Art. 43(2).

461 Hague Regulations, Art. 2.

fighting who fall outside these two categories, such as mercenaries<sup>462</sup> or civilians taking a direct part in hostilities,<sup>463</sup> are not entitled to combatant status.

- For the definition of “combatant,” “armed forces” and “*levée en masse*,” see Chapter 3.I.1.

For the purposes of detention, the most important consequence of combatant status is the privilege of combatancy, which affords combatants “the right to participate directly in hostilities” on behalf of a party to an international armed conflict.<sup>464</sup> This means that combatants, as legitimate representatives of the belligerent parties, enjoy immunity from prosecution for lawful acts of war, that is to say, for hostile acts carried out in conformity with IHL. At the same time, combatants also have a duty to respect IHL.<sup>465</sup> They do not enjoy immunity from prosecution for violations of IHL that are punishable as a matter of international criminal law or under the national law of the capturing State.<sup>466</sup> The privilege of combatancy does not exist in IHL governing non-international armed conflict.

- On the absence of combatant status in non-international armed conflicts, see Chapter 3.I.1.c. and Section I.1.b. below.
- On the specific issues arising in relation to detention in situations of non-international armed conflict, see Section IV below.

#### (b) “Unprivileged” or “unlawful” combatants

As we saw in Chapter 3, civilians directly participating in hostilities and others supporting the enemy’s war effort who do not enjoy the privilege of combatancy are sometimes described as “unprivileged” or “unlawful” combatants and said to fall outside the categories of person protected by the 1949 Geneva Conventions. Most notably, in the aftermath of the terrorist attacks of 11 September 2001, the United States interned hundreds of persons as “unlawful combatants” in detention centres at the Guantanamo Bay Naval Station in Cuba and elsewhere, initially without affording them any status or protection under the 1949 Geneva Conventions.

In this discussion of detention and internment, it must be reiterated that the concepts of “unprivileged” or “unlawful” combatant are not technical

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462 AP I, Art. 47(1).

463 AP I, Art. 51(3).

464 AP I, Art. 43(2).

465 AP I, Art. 44(2).

466 On the obligation of the detaining State to take repressive measures, see Chapter 7.II.2.f.

IHL terms and do not create any specific status distinct from those already foreseen in IHL. From a legal perspective, the classification of persons captured by a belligerent party as “unprivileged” or “unlawful” combatants cannot deprive them of the humanitarian protection afforded by IHL. The concept of “unprivileged combatant,” properly understood, only implies that the person in question does not have the “right” to directly participate in hostilities derived from the privilege of combatancy, which means that he or she can be prosecuted for any act or omission that is punishable under the applicable national law, even if such conduct does not violate IHL. This does not, however, require or justify the creation of a status and detention regime distinct from those foreseen in IHL.

Even more problematic than the concept of “unprivileged” combatant is that of “unlawful” combatant, which implies not only the absence of the privilege of combatancy, but also inherent illegality; it should therefore be used with even greater caution. Even though IHL limits the “right” to directly participate in hostilities to privileged combatants, it does not prohibit anyone from taking up arms in a situation of armed conflict and from being an “unprivileged combatant.” IHL simply requires that all those doing so comply with its rules on the conduct of hostilities. States are free, of course, to prohibit persons not entitled to the privilege of combatancy from directly participating in hostilities and, thus, to turn combatancy that is “unprivileged” as a matter of IHL into combatancy that is “unlawful” as a matter of national law. Whatever approach is taken in national legislation, however, the concept of “unlawful combatant” cannot be derived from IHL and does not give rise to or terminate any particular status under that body of law.

Just as is the case in the context of hostilities, the use of the terms “unprivileged combatant” and “unlawful combatant” in the context of conflict-related detention has contributed to serious misunderstandings and abuse. In the present discussion, therefore, the term “combatant” will be used in its technical meaning only, namely as referring to persons entitled to the privilege of combatancy in situations of international armed conflict.

→ On the relevance of the concepts of “unprivileged” and “unlawful” combatant in the conduct of hostilities, see Chapter 3.I.1.d.

## 2. Prisoners of war

Combatants who have fallen into the power of an adverse party to a conflict are prisoners of war, regardless of whether they are members of the regular or



F. Clarke/ICRC

Field exercise: escorting a prisoner of war, Russia, 2002.

irregular armed forces or participants in a *levée en masse*.<sup>467</sup> In the case of irregular armed forces, the Third Geneva Convention ties their entitlement to prisoner-of-war status to collective fulfilment of the same four conditions that the Hague Regulations require for combatant status, namely: (1) to be commanded by a person responsible for his or her subordinates; (2) to have a fixed distinctive sign recognizable at a distance; (3) to carry arms openly; and (4) to conduct their operations in accordance with the laws and customs of war.<sup>468</sup> Under Additional Protocol I, the requirements of visible distinction from the civilian population and respect for IHL are no longer considered to be collective prerequisites for the collective entitlement to prisoner-of-war status of an irregular armed force or group. Rather, combatants have an individual obligation to visibly distinguish themselves from the civilian population during their military operations; failure to do so may entail loss of their individual entitlement to prisoner-of-war status.<sup>469</sup> Also entitled to prisoner-of-war status, but not to the privilege of combatancy, are civilians formally authorized to accompany the armed forces, such as civilian crew members of military aircraft, war correspondents, private contractors, and crew members of the merchant marine or civilian aircraft of the belligerent parties.<sup>470</sup> Medical and religious personnel who have fallen into the hands of an adverse party are not considered as prisoners of war regardless of whether they are civilians or

467 Hague Regulations, Arts 1 and 2; GC III, Art. 4(A)(1), (2), (3) and (6); AP I, Art. 44(1).

468 GC III, Art. 4(A)(2).

469 AP I, Arts 44(3) and 46; CIHL, Rule 106.

470 GC III, Art. 4(4) and (5).



members of the armed forces.<sup>471</sup> They may be retained only to the extent required to meet the medical and spiritual needs of prisoners of war, and are not considered as being interned or detained *stricto sensu*.<sup>472</sup> Nevertheless, retained personnel are entitled, as a minimum, to the same benefits and protection as prisoners of war.<sup>473</sup>

Two particular categories of person must also be treated as prisoners of war: demobilized military personnel in occupied territory and military personnel interned in a neutral country. The first case covers former military personnel residing in occupied territory who are interned by the occupying power for security reasons because of their former membership in the opposing armed forces and their continued allegiance to an opposing belligerent in an ongoing armed conflict. Although such former military personnel must be regarded as civilians, they are treated as prisoners of war once they are interned.<sup>474</sup> The second case concerns military internees in neutral countries. Neutral States receiving on their territory members of the armed forces of belligerent parties, including the wounded and sick, are obliged to intern such personnel and to provide them, as a minimum, with the humanitarian benefits and protection afforded to prisoners of war.<sup>475</sup>

The most important consequence of prisoner-of-war status is that, in principle, prisoners of war may be interned by the detaining power until the end of active hostilities without any particular judicial or administrative procedure.<sup>476</sup> The internment of prisoners of war is not punitive but preventive in nature. It essentially aims to keep hostile combatants off the battlefield under humane conditions and to protect them from the dangers resulting from ongoing hostilities. During their internment, prisoners of war benefit from a detailed regime of rights and protections spelled out, most notably, in the Third Geneva Convention.

### 3. Persons protected under the Fourth Geneva Convention

As a general rule, persons not qualifying for prisoner-of-war status are covered by the Fourth Geneva Convention “on the protection of civilian persons in time of war.” Contrary to its title, the protection of the Fourth Geneva Convention does not depend on civilian status. The Convention protects not only (and not all) civilians, but essentially all persons not entitled

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471 GC I, Art. 28(2).

472 GC I, Arts 28(1) and (3), and 30; GC II, Art. 37(2) and (3).

473 GC I, Art. 28(2); GC II, Art. 33(1).

474 GC III, Art. 4(B)(1).

475 GC III, Art. 4(B)(2); Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907, Art. 11.

476 GC III, Art. 118(1); CIHL, Rule 128 A.

to prisoner-of-war status “who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”<sup>477</sup> Thus, beyond the general civilian population, the Fourth Geneva Convention’s protective scope also extends to civilians who have directly participated in hostilities, mercenaries, and even members of the armed forces who have lost their entitlement to prisoner-of-war status as a result of espionage or because they failed to distinguish themselves from the civilian population as required by IHL. The only persons not entitled to prisoner-of-war status whom a belligerent State is not obliged to protect under the Fourth Geneva Convention are its own nationals and, provided that it maintains normal diplomatic relations with the State of nationality, the nationals of neutral States within its territory and the nationals of co-belligerent States.<sup>478</sup>

The exclusion of nationals can prove to be particularly problematic in wars of national liberation that are governed by the rules applicable to international armed conflicts but in which, formally, the adversaries may well have the same nationality.<sup>479</sup> Finally, nationals of States not party to the Fourth Geneva Convention are also excluded from its protection. In view of the quasi-universal ratification of the 1949 Geneva Conventions and of the customary nature of their provisions, however, this reservation can be safely discarded as irrelevant today.

#### 4. Other persons deprived of their liberty

As has been shown, the vast majority of persons who have fallen into the power of an adverse party to an international armed conflict qualify either as prisoners of war or as protected persons under the Fourth Geneva Convention. But even those exceptional cases that do not fulfil the nationality criteria of the Fourth Geneva Convention are not deprived of the protection of IHL. According to Additional Protocol I, all persons affected by a situation of international armed conflict who are in the power of a belligerent party and who do not benefit from more favourable treatment under IHL must be treated humanely in all circumstances, and must benefit, as a minimum, from a number of fundamental guarantees, including judicial guarantees, that have become part of customary international law.<sup>480</sup> Moreover, there is a growing consensus that all persons deprived of their liberty by a belligerent State fall within the jurisdiction of that State and therefore benefit

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477 GC IV, Art. 4(1) and (4).

478 GC IV, Art. 4(2). However, see the interpretation of “nationality” by the ICTY in *The Prosecutor v. Dusko Tadić*, *op. cit.* (Note 70), paras 163–169.

479 AP I, Art. 1(4).

480 See, most notably, AP I, Art. 75, and CIHL, Rules 87–105.

from the protection of international human rights law. Consequently, in contemporary situations of international armed conflict, there is no room whatsoever for the argument that certain categories of person deprived of their liberty fall outside the protection of the law, regardless of whether they are called “terrorists,” “traitors” or “unlawful combatants.”

### To go further (The relevance of “status” in the context of detention)<sup>481</sup>

- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, Chapter 6: [\[Part 1\] Combatants](#) and [\[Part 2\] Prisoners of war](#), pp. 178–185.
- Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, Oxford University Press, Oxford, 2010, 238 pp.
- Charles H.B. Garraway, “Combatants: Substance or semantics?,” in Michael Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines, Essays in Honour of Yoram Dinstein*, Martinus Nijhoff, Leiden/Boston, 2007, pp. 317–335.
- Knut Dörmann, “[The legal situation of “unlawful/unprivileged combatants.”](#)” *IRRC*, Vol. 85, No. 849, March 2003, pp. 45–74.
- Frederik Naert, “Detention in peace operations: The legal framework and main categories of detainees,” *Revue de droit militaire et de droit de la guerre*, Vol. 1–2, No. 45, 2006, pp. 51–78.
- Gregory P. Noone *et al.*, “Prisoners of war in the 21st century: Issues in modern warfare,” *Naval Law Review*, Vol. 50, 2004, pp. 1–69.
- Marco Sassòli, “The status of persons held in Guantánamo under international humanitarian law,” *Journal of International Criminal Justice*, Vol. 2/1, March 2004, pp. 96–106.
- “Security Detention,” ICRC webpage. Available at: <https://www.icrc.org/en/war-and-law/contemporary-challenges-for-ihl/security-detention>

### *How Does Law Protect in War?*

- Case No. 126, [Israel, Military Prosecutor v. Kassem and Others](#)
- Case No. 261, [United States, Status and Treatment of Detainees Held in Guantanamo Naval Base](#)
- Case No. 286, [The Conflict in Western Sahara](#)

## II. INTERNMENT OF PRISONERS OF WAR

### 1. Determination and presumption of status

As stated above, persons who have fallen into the power of an adverse party to a conflict are entitled to prisoner-of-war status if they qualify as:

- (a) combatants (members of the armed forces or participants in a *levée en masse*);<sup>482</sup>
- (b) civilians formally authorized to accompany the armed forces;<sup>483</sup>
- (c) demobilized military personnel in occupied territory;<sup>484</sup>
- (d) military personnel interned in neutral territory.<sup>485</sup>

In the reality of contemporary armed conflicts, the presence of a growing variety of irregular weapon-bearers makes it increasingly difficult to reliably determine the status and allegiance of captured persons.<sup>486</sup> IHL therefore provides that persons having taken part in hostilities and having fallen into the power of an adverse party must be presumed to be prisoners of war, if they either claim or appear to be entitled to prisoner-of-war status, or if the party on which they depend claims such status on their behalf.<sup>487</sup> Should any doubt arise as to whether such persons are entitled to prisoner-of-war status, they must be afforded such status until such time as their status has been determined by a competent tribunal.<sup>488</sup> Moreover, persons being tried by an adverse party for offences arising out of the hostilities have the right to assert their entitlement to prisoner-of-war status and to have it adjudicated by a judicial tribunal, whenever possible before the trial for the offence.<sup>489</sup>

Treaty IHL does not specify which bodies can be regarded as “competent tribunals” for the determination of individual entitlement to prisoner-of-war status. Thus, in contrast to the judicial tribunals required in criminal cases, the establishment of military commissions by the executive branch appears to be acceptable for this purpose. As a minimum, however, any such competent tribunal must meet the requirements of neutrality and independence, and guarantee fundamental procedural safeguards, all of which is inherent in the concepts of due process and the rule of law. Finally, in order to shield prisoners of war from pressure and to ensure the inviolability of their

482 GC III, Art. 4(A)(1), (2), (3) and (6); AP I, Art. 44(1).

483 GC III, Art. 4(A)(4) and (5).

484 GC III, Art. 4(B)(1).

485 GC III, Art. 4(B)(2); Hague Convention No. V, Art. 11.

486 GC III, Art. 4(A)(3).

487 AP I, Art. 45(1).

488 GC III, Art. 5(2); AP I, Art. 45(1).

489 AP I, Art. 45(2).

protection for the duration of their captivity, they may in no circumstances renounce any or all of the rights afforded to them under IHL.<sup>490</sup>

## 2. Beginning and end of captivity

### (a) Beginning of captivity

Prisoners of war benefit from the protection of their status from the time they fall into the power of the enemy and until their final release and repatriation.<sup>491</sup> They are considered to have “fallen into the power of the enemy” once they are captured in the course of hostilities or taken into custody following surrender or mass capitulation. Being *hors de combat* is not sufficient.<sup>492</sup>

Upon capture, identity documents and objects of personal use remain in the possession of prisoners of war, likewise equipment issued for their personal protection, such as helmets and gas masks.<sup>493</sup> For security reasons, money and other objects of value may be taken from prisoners following a formal procedure.<sup>494</sup>

Prisoners of war are not obliged to provide any information other than their surname, first name, rank, date of birth, and army, regimental, personal or serial number, or equivalent information, which must also be indicated on a personal identity card issued by the belligerent party of origin.<sup>495</sup> The identity of captured prisoners of war must be communicated without delay to their country of origin and their families, through National Information Bureaux and the ICRC’s Central Tracing Agency.<sup>496</sup> The same channels of communication are used throughout captivity for notification of transfers, releases, repatriations, escapes, hospitalizations and deaths, and to respond to any enquiries concerning the fate of individual prisoners of war.<sup>497</sup>

490 GC III, Art. 7.

491 GC III, Art. 5.

492 J.S. Pictet (ed.), *Geneva Convention Relative to the Treatment of Prisoners of War*, Vol. III of *The Geneva Conventions of 12 August 1949: Commentary*, ICRC, Geneva, 1960, p. 76 (an updated commentary is currently being prepared and will be available online as of 2017). On the difference between being “in the power” of an adverse party within the meaning of *hors de combat* (AP I, Art. 41(1)) and having “fallen into the power” of an adverse party for the purpose of determining prisoner-of-war status (AP I, Art. 41(3); GC III, Art. 5(1)), see Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols*, *op. cit.* (note 186), paras 1611–1612.

493 GC III, Art. 18(1), (2) and (3); CIHL, Rule 122.

494 GC III, Art. 18(4), (5) and (6).

495 GC III, Art. 17(1) and (3). See also CIHL, Rule 123.

496 GC III, Arts 70, 122 and 123. For more information on National Information Bureaux and the Central Tracing Agency, see Textbox 6, Chapter 4, VI.3.d.

497 GC III, Art. 122(5)-(7).

After capture, prisoners of war must be evacuated to camps situated at a safe distance from the combat zone.<sup>498</sup> They must be provided with the necessary food, water, clothing and medical care, and suitable precautions must be taken to ensure their safety during evacuation.<sup>499</sup> The duty to evacuate prisoners is subject to two exceptions. First, wounded or sick prisoners of war may be temporarily kept back if their medical condition is such that being evacuated would expose them to greater risks than remaining in a danger zone.<sup>500</sup> Second, when prisoners of war are captured during unusual conditions of combat that prevent their evacuation, such as during commando operations behind enemy lines, they may be disarmed, but must be released and all feasible precautions must be taken to ensure their safety.<sup>501</sup> Similar conditions apply to transfers of prisoners of war after their arrival in a camp.<sup>502</sup>

### (b) Early termination of captivity

After their evacuation, prisoners of war will usually be interned until the end of active hostilities.<sup>503</sup> There are three circumstances in which captivity may end earlier:

- repatriation, or accommodation in a neutral country, of wounded or sick prisoners of war for medical or humanitarian reasons;<sup>504</sup>
- escape (prisoners of war who are recaptured after an unsuccessful attempt to escape may be subjected only to disciplinary punishment,<sup>505</sup> whereas no punishment whatsoever may be imposed in case of recapture after a successful escape;<sup>506</sup> a prisoner's escape is considered successful when he: (1) has rejoined his own or co-belligerent armed forces; (2) has left the territory controlled by the detaining power or its allies; or (3) has reached a friendly or allied ship in the territorial waters, but not under the control, of the detaining power);<sup>507</sup>
- death, which must be followed by a formal procedure, in particular if murder is suspected or if the cause of death is unknown.<sup>508</sup>

498 GC III, Arts 19(1) and (3), and 20(1) and (2).

499 GC III, Arts 19(3) and 20(2).

500 GC III, Art. 19(2).

501 AP I, Art. 41(3).

502 GC III, Arts 46–48.

503 GC III, Art. 118(1).

504 GC III, Art. 109. For a detailed list of cases entitled to such repatriation or accommodation, see GC III, Art. 110.

505 GC III, Art. 92(1) and (3).

506 GC III, Art. 91(2).

507 GC III, Art. 91(1).

508 GC III, Arts 120 and 121(1), (2) and (3); CIHL, Rule 116.

### (c) General release, repatriation and transfers

At the cessation of active hostilities, all prisoners of war must be released and repatriated without delay, even if no peace treaty or armistice agreement has been reached between the parties.<sup>509</sup> Thus, the decisive criterion for the obligation of release and repatriation to arise is not the political settlement of the conflict but the actual end of hostilities, together with a reasonable expectation that they will not resume in the foreseeable future. Whether this is the case must be determined objectively for each context. For example, depending on the circumstances, indications that active hostilities have ceased may include the withdrawal of troops from operational areas, the resumption of negotiations or diplomatic relations between the parties, the demobilization of parts of their armed forces, and the deployment of multinational forces as ceasefire observers or administrators of disputed territory. In the conflicts between Ethiopia and Eritrea, for instance, and between the Islamic Republic of Iran and Iraq, the repatriation of thousands of prisoners of war was delayed for many years, with significant humanitarian consequences for all sides.

The duty of the detaining power to release and repatriate prisoners of war is absolute. While no prisoner of war may be repatriated against his will as long as hostilities are ongoing,<sup>510</sup> prisoners of war are not, in principle, at liberty to refuse such repatriation after the cessation of active hostilities.<sup>511</sup> Nevertheless, State practice since World War II has increasingly shifted towards accepting the refusal of prisoners of war to be repatriated, particularly under the customary principle of *non-refoulement*. According to that principle, no person may be transferred to a country where he or she may have reason to fear persecution, torture or death on account of his or her race, religion, nationality or political opinion. The principle of *non-refoulement* originates in refugee law and has also been expressly recognized in connection with transfers of persons protected under the Fourth Geneva Convention.<sup>512</sup> It is widely recognized as part of customary international law. Finally, prisoners of war who are detained in connection with a judicial prosecution or a conviction for a criminal offence can be held beyond the cessation of hostilities until the judicial proceedings are completed or until they have served their sentence.<sup>513</sup>

509 GC III, Art. 118(1).

510 GC III, Art. 109(4).

511 GC III, Art. 7.

512 See Convention relating to the Status of Refugees, 28 July 1951, Art. 33(1); GC IV, Art. 45(4).

513 GC III, Art. 115(2) and (3); CIHL, Rule 128 *in fine*.

### 3. Treatment and conditions of internment

#### (a) Responsibility and humane treatment

According to the Third Geneva Convention, prisoners of war “are in the hands of the enemy Power, but not of the individuals or military units who have captured them.”<sup>514</sup> Thus, irrespective of the individual responsibilities that may exist, ultimate responsibility for the treatment given to prisoners of war lies with the party to the conflict detaining them. Prisoners of war may be transferred to another State only if the latter is able and willing to afford them the protection they are entitled to under IHL. Should they be so transferred, responsibility for their treatment moves to the receiving State for such time as they are in its custody.<sup>515</sup> If that State fails to fulfil its obligations under IHL in any important respect, however, the original detaining power must take effective measures to correct the situation or ensure that the prisoners of war are returned to its jurisdiction.<sup>516</sup>

Prisoners of war are entitled to humane treatment and respect for their person at all times.<sup>517</sup> The detaining power must treat all prisoners of war equally, without any adverse distinction based on criteria such as race, nationality, religious belief or political opinion. This does not preclude, of course, privileged treatment justified by rank, sex, age, medical condition or professional qualifications.<sup>518</sup> IHL prohibits any unlawful act or omission causing death or seriously endangering the health of prisoners of war, including, in particular, physical mutilation, and medical or scientific experiments that are not justified by the medical condition and not in the interests of the prisoner concerned.<sup>519</sup> Also, prisoners of war must at all times be protected against violence, intimidation, insults and public curiosity.<sup>520</sup> As prisoners of war are particularly exposed to potential acts of revenge by the detaining power, the Third Geneva Convention specifically prohibits any measures of reprisal against them.<sup>521</sup>

#### (b) Conditions of internment

##### *Places of internment*

The detaining power may subject prisoners of war to internment or restrict their movements, but it may not hold them in closed confinement or penitentiaries except where necessary to safeguard their health or for the purpose of penal

514 GC III, Art. 12(1).

515 GC III, Art. 12(2).

516 GC III, Art. 12(3).

517 GC III, Arts 13 and 14; CIHL, Rule 87.

518 GC III, Art. 16. See also GC III, Arts 43(1), 44(1) and 45(1); CIHL, Rule 88.

519 GC III, Art. 13(1); CIHL, Rule 92.

520 GC III, Art. 13(2).

521 GC III, Art. 13(3); CIHL, Rule 146.



and disciplinary sanctions.<sup>522</sup> Prisoners of war should be interned in groups according to their nationality, language and customs, and with the comrades with whom they were serving at the time of capture.<sup>523</sup> Prisoners of war may also be partially or wholly released on parole or promise where applicable.<sup>524</sup>

As far as places of internment are concerned, prisoners of war must be held on land and outside zones exposed to military combat or an unhealthy climate.<sup>525</sup> They are entitled to the same protective measures against aerial bombardments and other dangers of war as the local civilian population.<sup>526</sup> In order to be protected from direct attacks and the incidental effects of the hostilities, prisoner-of-war camps should be marked by the letters PW or PG – of a size and appearance that make them clearly visible – and their location communicated to the opposing party.<sup>527</sup>

### ***Basic needs***

The detaining power must provide prisoners of war in its custody with the necessary food, water, shelter, clothing and medical care free of charge,<sup>528</sup> while taking into account the local climate, the nature of their daily work, and their habits and customs.<sup>529</sup> Prisoners of war must be accommodated under conditions comparable to those of the forces of the detaining power.<sup>530</sup> Where female prisoners of war are held in the same camps as male, separate dormitories and sanitary facilities must be provided for them.<sup>531</sup> Within the financial means available to them, prisoners of war must also be allowed to procure additional foodstuffs, soap and tobacco and similar articles at local market prices.<sup>532</sup>

The detaining power must take all sanitary measures necessary to ensure clean and hygienic conditions in the camps<sup>533</sup> and must conduct medical inspections at least once a month.<sup>534</sup> Prisoners of war must have access to medical care corresponding to their needs, preferably from medical personnel of the belliger-

522 GC III, Arts 21(1) and 22(1).

523 GC III, Art. 22(3).

524 GC III, Art. 21(2) and (3).

525 GC III, Arts 22(1) and (2), and 23(1); CIHL, Rule 121.

526 GC III, Art. 23(1) and (2).

527 GC III, Art. 23(3) and (4).

528 GC III, Arts 15 and 30(5); CIHL, Rule 118.

529 GC III, Arts 26(1), (2) and (3), and 27(1).

530 GC III, Art. 25(1).

531 GC III, Arts 25(4) and 29(2); CIHL, Rule 119.

532 GC III, Art. 28(1).

533 GC III, Art. 29(1).

534 GC III, Art. 31.

ent party to which they belong and, if possible, of their nationality.<sup>535</sup> For this purpose, the detaining power may retain medical and religious personnel of the opposing armed forces and require them to exercise their medical and spiritual functions for the benefit of their captured comrades.<sup>536</sup>

Indeed, within the disciplinary routine prescribed by the military authorities, prisoners of war must be allowed to freely exercise their religion and to attend the services of their faith in premises adequate for that purpose.<sup>537</sup> Retained religious personnel and prisoners of war who, in their civilian lives, are ministers of their religion must be allowed to freely exercise their ministry.<sup>538</sup> The detaining power must also encourage prisoners of war to engage in intellectual, educational, and recreational activities, including sports and games, and provide them with the time, premises and equipment necessary for that purpose.<sup>539</sup>

### ***Command and discipline***

Every prisoner-of-war camp must be put under the immediate authority of a commissioned officer belonging to the regular armed forces of the detaining power<sup>540</sup> and responsible for the application of the Third Geneva Convention.<sup>541</sup> Every order and command addressed to individual prisoners of war must be given in a language they understand.<sup>542</sup> The text of the Third Geneva Convention and of any special agreement concluded between the belligerent parties must also be posted inside the prisoner-of-war camp in a language the prisoners understand.<sup>543</sup> Throughout their captivity, prisoners of war remain subject to camp discipline. The detaining authority may, within the terms of the Third Geneva Convention, take all measures reasonably necessary to prevent or suppress riots, escapes or similar acts of disobedience. However, the use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, constitutes an extreme measure and must always be preceded by warnings appropriate to the circumstances.<sup>544</sup>

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535 GC III, Art. 30(3).

536 GC III, Art. 33(2).

537 GC III, Art. 34; CIHL, Rule 127.

538 GC III, Arts 35–37.

539 GC III, Art. 38.

540 GC III, Art. 39(1).

541 *Ibid.*

542 GC III, Art. 41(2).

543 GC III, Art. 41(1).

544 GC III, Art. 42.

### (c) Labour and financial resources

In principle, prisoners of war who are fit may be compelled to work, taking into account their age, sex, rank and physical condition.<sup>545</sup> Officers or persons of equivalent status may not be compelled to work, and non-commissioned officers may be required to carry out supervisory tasks only. Both may, however, request that suitable work be found for them.<sup>546</sup> Mandatory work is restricted to tasks related to camp administration, installation or maintenance, or to one of the other areas provided for in the Third Geneva Convention.<sup>547</sup> Always excluded is work of a military character or purpose, or work in the metallurgical, machinery and chemical industries that may be expected to make an important contribution to the war effort.<sup>548</sup> Also prohibited is humiliating work and, except in the case of volunteers, unhealthy or dangerous work, such as the removal of mines and similar devices.<sup>549</sup> Any prisoner of war may be exempted from work for medical reasons.<sup>550</sup> Working conditions must be adequate in terms of accommodation, food, clothing and equipment and may not be inferior to those enjoyed by nationals of the detaining power employed in similar work, particularly with regard to duration, training, safety and labour protection.<sup>551</sup>

All prisoners of war are entitled to receive from the detaining power fair payment for the work they are required to carry out, as well as a monthly advance of pay commensurate with their rank in their country of origin.<sup>552</sup> Remunerated work includes spiritual or medical duties carried out for the benefit of their comrades.<sup>553</sup> Prisoners must also be allowed to receive supplementary payments from their country of origin,<sup>554</sup> and to receive or send funds through money transfers.<sup>555</sup> In all cases, however, the detaining power may limit the maximum amount of money in cash that prisoners may have in their possession.<sup>556</sup>

### (d) Relations with the world outside

It is of paramount importance that prisoners of war be able to maintain relations with the world outside, most notably with their families and their country of origin. Hence IHL requires that individual prisoners of war be enabled to send a capture card rapidly to their family and to the ICRC's Central Tracing Agency, informing them of their capture, postal address and state of health.<sup>557</sup> Throughout their captivity, prisoners of war are allowed to

545 GC III, Art. 49(1).

546 GC III, Art. 49(2) and (3).

547 GC III, Art. 50.

548 *Ibid.*

549 GC III, Art. 52; CIHL, Rule 95.

550 GC III, Art. 55.

551 GC III, Arts 51 and 53.

552 GC III, Arts 60, 62 and 67.

553 GC III, Art. 62.

554 GC III, Art. 61.

555 GC III, Art. 63.

556 GC III, Art. 58.

557 GC III, Art. 70.



E. Sury/ICRC

Repatriation of 279 Ethiopian prisoners of war under the aegis of the ICRC, Eritrean-Ethiopian border, 2002.

correspond through letters, cards – and, where necessary, telegrams – in their native language.<sup>558</sup> Today, this must probably be construed to include phone calls and electronic messages sent via the internet. Prisoners of war may also receive individual parcels or collective shipments containing items such as foodstuffs, clothing, medical supplies and articles of a religious, educational or recreational character.<sup>559</sup> All correspondence, parcels or shipments addressed to prisoners of war or sent by them may be censored or examined by both the sending and the receiving State.<sup>560</sup>

Further, representatives of the Protecting Power and ICRC delegates must have access to all places where prisoners of war may be held. They must be allowed to interview the prisoners and their representatives without witnesses, if necessary through an interpreter, and to freely select the places they wish to visit. The duration and frequency of these visits may not be restricted, and visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure.

558 GC III, Art. 71; CIHL, Rule 125.

559 GC III, Art. 72.

560 GC III, Art. 76(1) and (2). For further restrictions placed on the number and frequency of items of correspondence, parcels and shipments, see GC III, Arts 71, 72 and 76(3). See also J.S. Pictet (ed.), *Commentary on the Third Geneva Convention*, *op.cit.* (note 492), pp. 376–377.

Before the visits, the names of the ICRC delegates must be submitted for approval to the detaining power.<sup>561</sup>

### (e) Relations with the authorities

#### *Requests, complaints and representatives*

Prisoners of war have an unrestricted right to make requests and complaints regarding their conditions of internment to the detaining power, the representatives of the Protecting Power or the ICRC delegates.<sup>562</sup> The prisoners of war should be represented by the most senior officer among them or, in the absence of officers, by a prisoner elected by his comrades and approved by the detaining power.<sup>563</sup> The detaining power must afford such “prisoners’ representatives” the time, facilities and freedom of movement necessary to accomplish their duties in terms of inspection, representation and communication.<sup>564</sup>

#### *Disciplinary and judicial authority*

Prisoners of war are subject to the laws, regulations and orders in force in the armed forces of the detaining power. The latter may, within the boundaries of IHL, take judicial or disciplinary measures in respect of any punishable offence committed by a prisoner of war.<sup>565</sup> The Third Geneva Convention is based on the principle that prisoners of war subjected to disciplinary or judicial proceedings and sanctions should be given the same rights, protection and treatment as members of the armed forces of the detaining power in the same situation. This applies not only to the question of whether the case should be adjudicated by a military or civilian court,<sup>566</sup> but also to the nature of the penalties<sup>567</sup> and to the treatment and living conditions of prisoners during the execution of such penalties.<sup>568</sup>

#### *Preferential treatment*

In some respects, IHL even requires that prisoners of war receive preferential treatment, most notably because they have no duty of allegiance towards the detaining power and find themselves in captivity owing to circumstances beyond their control. For example, the Third Geneva Convention stipulates that the competent authorities should exercise lenience and, wherever possible, give preference to disciplinary over judicial measures,<sup>569</sup> and that in fixing

561 GC III, Art. 126; CIHL, Rule 124.

562 GC III, Art. 78(1) and (2).

563 GC III, Art. 79.

564 GC III, Arts 80 and 81.

565 GC III, Art. 82.

566 GC III, Art. 84(1).

567 GC III, Art. 87(1).

568 GC III, Arts 88 and 108.

569 GC III, Art. 83.

a sentence they should not be bound by minimum penalties prescribed in national law.<sup>570</sup> For the same reason, no prisoner of war may be deprived of his rank by the detaining power, or prevented from wearing his badges.<sup>571</sup> The special status and situation of prisoners of war must imperatively be given the most careful consideration before pronouncing a death sentence. When such a sentence is passed, the status and situation of prisoners of war require that its execution be delayed for at least six months.<sup>572</sup> The detaining power must notify the prisoners' representative and the Protecting Power of any judicial proceedings instituted against a prisoner of war, and of any judgment and sentence pronounced against him,<sup>573</sup> so as to allow representatives of the Protecting Power to attend the trial and to take any other pertinent measures falling within their function.<sup>574</sup> Finally, the Third Geneva Convention also makes it clear that prisoners of war prosecuted under the laws of the detaining power for acts committed prior to their capture retain the benefits and protection of their status under IHL even if convicted.<sup>575</sup>

### *Procedural guarantees*

The rules of IHL regulating the conduct of disciplinary and judicial proceedings and the execution of sanctions against prisoners of war reflect a catalogue of fundamental guarantees widely accepted as inherent in the basic concepts of the rule of law, of a fair trial and of humane treatment. Accordingly, in no circumstances may prisoners of war be tried by a court of any kind that fails to offer the essential guarantees of independence and impartiality as generally recognized or to afford the accused adequate rights and means of defence.<sup>576</sup> More specifically, an accused prisoner of war must be informed of the charges against him and of his right to assistance by a qualified advocate or counsel of his own choice, to call witnesses and, if necessary, to the services of a competent interpreter.<sup>577</sup> Prisoners of war may not be tried or sentenced for acts that were not punishable at the time they were committed.<sup>578</sup> They may not be punished more than once for the same act,<sup>579</sup> may not be coerced into making a confession,<sup>580</sup> and may not be convicted without an opportunity to defend

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570 GC III, Art. 87(2).

571 GC III, Art. 87(4).

572 GC III, Arts 100(3) and 101.

573 GC III, Arts 104 and 107.

574 GC III, Art. 105(5).

575 GC III, Art. 85.

576 GC III, Art. 84(2); CIHL, Rule 100.

577 GC III, Arts 96(4) and 105(1); CIHL, Rule 100.

578 GC III, Art. 99(1); CIHL, Rule 101.

579 GC III, Art. 86; CIHL, Rule 100.

580 GC III, Art. 99(2); CIHL, Rule 100.

themselves.<sup>581</sup> Every prisoner of war also has a right of appeal or petition against any sentence pronounced against him.<sup>582</sup>

### ***Prohibition of cruel, inhuman or degrading punishment***

Any prisoner of war convicted for a disciplinary or criminal offence remains under the protection of IHL, including in matters concerning the choice and execution of the penalty. Most importantly, disciplinary punishments may in no case be inhuman, brutal or dangerous to the health of prisoners of war.<sup>583</sup> It is also prohibited to resort to collective punishment for individual acts, to corporal punishment, to imprisonment in premises without daylight and, in general, to any form of torture or cruelty.<sup>584</sup> Finally, prisoners of war who have served disciplinary or judicial sentences may not be treated differently from other prisoners of war.<sup>585</sup>

### **To go further (Internment of prisoners of war)<sup>586</sup>**

- Nigel S. Rodley, *The Treatment of Prisoners under International Law*, Oxford University Press, Oxford, 3rd ed., 2009.
- Silvia Borelli, “[Casting light on the legal black hole: International law and detentions abroad in the ‘War on Terror’](#),” *IRRC*, Vol. 87, No. 857, March 2005, pp. 39–68.

### ***How Does Law Protect in War?***

- Document No. 97, [United States Military Tribunal at Nuremberg, \*United States v. Wilhelm von Leeb et al.\*](#)
- Case No. 99, [United States, \*Ex Parte Quirin et al.\*](#)
- Case No. 114, [Malaysia, \*Osman v. Prosecutor\*](#)
- Case No. 160, [Eritrea/Ethiopia, \*Partial Award on POWs\*](#)
- Case No. 170, [ICRC, \*Iran/Iraq Memoranda\*](#)
- Case No. 263, [United States, \*Hamdan v. Rumsfeld\*](#)

581 GC III, Arts 96 and 99(3); CIHL, Rule 100.

582 GC III, Art. 106; CIHL, Rule 100.

583 GC III, Art. 89(3).

584 GC III, Art. 87(3); CIHL, Rules 90–91 and 103.

585 GC III, Art. 88(4).

586 All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

### III. INTERNMENT AND DETENTION OF CIVILIANS

Not all persons deprived of their liberty in a situation of international armed conflict qualify for prisoner-of-war status. Particularly in occupied territories, but also within their own territory, belligerent States are regularly confronted with civilians engaged in criminal activities or posing a serious security threat requiring their detention. Moreover, captured mercenaries and members of the armed forces caught in the act of espionage, or while preparing or conducting attacks without wearing a uniform, are not entitled to prisoner-of-war status. These persons generally fall within the scope of protection of the Fourth Geneva Convention. Furthermore, persons not entitled to the status of “protected person” under the Fourth Geneva Convention nevertheless benefit from fundamental guarantees recognized under customary IHL, which provide similar protection.<sup>587</sup> While this section focuses on civilians deprived of their liberty by a party to an international armed conflict, it should be kept in mind that the same protection also applies to other persons falling within the personal scope of applicability of the Fourth Geneva Convention as described in Section I.3. above.

#### 1. Beginning and end of internment

##### (a) Beginning of internment

###### *Compulsory internment*

Compulsory internment is the most severe security measure at the disposal of a belligerent party. It may be imposed only as a last resort, when less intrusive measures of control, such as assigned residence, restrictions of movement or the prohibition of certain professional or political activities, are deemed inadequate.<sup>588</sup> In their own territory, parties to a conflict may order the internment of protected persons only if their security makes internment “absolutely necessary,”<sup>589</sup> whereas in occupied territories it must be considered “necessary for imperative reasons of security.”<sup>590</sup> Given the scope of discretion allowed to the detaining or occupying power, these terms can be regarded as largely synonymous. In essence, they require that the person in question pose a significant threat to the internal or external security of the detaining power that cannot be adequately addressed by less intrusive measures than his or her internment. This would undoubtedly include any activities amounting to direct participation in hostilities. Other activities or affiliations that may justify the internment of protected persons

587 AP I, Arts 45(3) and 75; CIHL, Rules 87–105.

588 GC IV, Arts 41(1) and 78(1).

589 GC IV, Art. 42(1).

590 GC IV, Art. 78(1).



include subversive activities carried out within the territory of the detaining power, membership in organizations aiming to cause disturbances, direct assistance to the enemy, and acts of sabotage or espionage. However, the mere fact that a person is an enemy national cannot be regarded as a security threat automatically justifying internment without completely defeating the idea of tailoring security measures to the requirements of each individual case and reserving internment for the most serious cases. In sum, the decisive factor seems to be that the detaining State “must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security.”<sup>591</sup> In all cases, however, internment must remain an exceptional measure of last resort.

### *Procedural safeguards*

The determination that a protected person represents a security threat necessitating his or her internment must be made for each individual in regular proceedings before an appropriate court or administrative board designated by the detaining or occupying power for that purpose, not before an individual judge or military officer.<sup>592</sup> Such proceedings must ensure that the person concerned is informed promptly, in a language he understands, of the reasons for his internment,<sup>593</sup> and must include the right of appeal.<sup>594</sup> Appeals must be decided as quickly as possible<sup>595</sup> and, if internment is maintained, the court or administrative board must review at least twice yearly the necessity of such internment with a view to the favourable amendment of the initial decision, if circumstances permit.<sup>596</sup> The increasingly severe humanitarian impact of long-term internment should always be taken into account. Unless the protected persons concerned object, the detaining power must notify the Protecting Power, without delay, of the names of all protected persons who have been interned or released from internment, along with any decisions of the relevant courts or administrative boards.<sup>597</sup> Pregnant women and mothers having dependent infants who are interned for reasons related to the armed conflict must have their cases considered with the utmost priority.<sup>598</sup>

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591 J.S. Pictet (ed.), *Commentary on the Fourth Geneva Convention*, *op. cit.* (note 387), p. 258.

592 J.S. Pictet (ed.), *Commentary on the Fourth Geneva Convention*, *op. cit.* (note 387), p. 369.

593 AP I, Art. 75(3).

594 GC IV, Art. 78(2).

595 GC IV, Arts 43(1) and 78(2).

596 GC IV, Arts 43(1) and 78(2).

597 GC IV, Art. 43(2).

598 AP I, Art. 76(2); CIHL, Rule 134.

### ***Voluntary internment***

If their situation renders it necessary,<sup>599</sup> protected persons finding themselves in the territory of a party to the conflict may also voluntarily demand their internment but, in order to ensure the genuineness of the demand and avoid abuse, must do so through representatives of the Protecting Power or the ICRC.<sup>600</sup> Cases in which voluntary internment may be in the interest of protected persons include situations where they are exposed to threats or violence on the part of the general population, or where their nationality or allegiance renders them unable to receive employment or otherwise earn a living. Similar situations could also arise for protected persons resident in occupied territories, for example in the case of civilians who have collaborated with the occupying power in a way that provokes the hostility of the general population. In such situations, the territorial State is obliged to respond favourably to demands for voluntary internment. However, the possibility of voluntary internment is not foreseen for occupied territories, and the Fourth Geneva Convention prohibits any internment in situations other than those expressly enumerated.<sup>601</sup>

### ***Punitive internment***

Although internment is generally a security measure that is preventive rather than punitive in nature, the Fourth Geneva Convention also recognizes the possibility of converting a sentence of imprisonment to one of internment for the same period as a (preferential) penalty for a criminal offence.<sup>602</sup> This exception to the preventive nature of internment applies only in occupied territory and aims to afford protected persons who have committed minor offences devoid of dishonourable motives the more beneficial treatment and conditions of internment as opposed to common imprisonment.<sup>603</sup> The Convention makes clear, however, that in such exceptional cases of punitive use, internment may not be imposed as an open-ended measure but, just as a sentence of imprisonment, must be of a duration determined in proportion to the offence committed.<sup>604</sup>

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599 J.S. Pictet (ed.), *Commentary on the Fourth Geneva Convention*, *op. cit.* (note 387), pp. 258–259.

600 GC IV, Art. 42(2).

601 GC IV, Art. 79.

602 GC IV, Art. 68(1).

603 J.S. Pictet (ed.), *Commentary on the Fourth Geneva Convention*, *op. cit.* (note 387), pp. 343–344.

604 GC IV, Art. 68(1).



P. Yazdiz/ICRC

Families welcoming released Ivorian internees, refugee camp, Liberia, 2012.

## (b) Termination of internment

### *Cessation of individual security threat*

Persons interned for actions related to the armed conflict must be released as soon as possible and, in any event, as soon as the circumstances or reasons justifying internment no longer exist.<sup>605</sup> It is the function of the periodic review to ensure that no protected person is subjected to compulsory internment for longer than is absolutely necessary for security reasons.

### *Escape*

Individual internees may also successfully escape. Internees who are recaptured after having escaped or when attempting to escape may be subjected to special surveillance, but are liable only to disciplinary punishment, even in the case of a repeat offence.<sup>606</sup>

### *Death*

Should an internee die, a death certificate must be prepared by a doctor.<sup>607</sup> IHL also contains provisions on the subsequent notification of the Protecting Power and the Central Tracing Agency,<sup>608</sup> the handling of wills,<sup>609</sup> proper burial or

<sup>605</sup> GC IV, Art. 132(1); AP I, 75(3); CIHL, Rule 128 B.

<sup>606</sup> GC IV, Art. 120(1) and (2). See also GC IV, Art. 120(3), for internees aiding and abetting an escape.

<sup>607</sup> GC IV, Art. 129(2).

<sup>608</sup> GC IV, Art. 129(3).

<sup>609</sup> GC IV, Art. 129(1).

cremation and the marking of graves.<sup>610</sup> If it is suspected that the internee was murdered, or if the cause of death is unknown, the detaining power must immediately conduct an official inquiry into the case,<sup>611</sup> prepare an official report<sup>612</sup> and, depending on the results of the inquiry, instigate appropriate criminal prosecutions.<sup>613</sup>

### ***Release for humanitarian reasons***

Belligerent parties should, even during hostilities, endeavour to release, repatriate, or return to their places of residence certain categories of internee, or to accommodate them in a neutral country, in particular children, pregnant women and mothers with infants and young children, the wounded and sick, and internees who have been detained for a long time.<sup>614</sup>

### ***General release, repatriation or return***

According to the Fourth Geneva Convention, internment “shall cease as soon as possible after the close of hostilities.”<sup>615</sup> This formulation is markedly less demanding on the detaining power than the strict requirement of release and repatriation “without delay after the cessation of hostilities” used for prisoners of war.<sup>616</sup> The rationale of the provision is not to prohibit all forms of internment after the end of hostilities, but to prevent the indefinite prolongation of internment when the general context justifying such measures has ceased to exist.<sup>617</sup> Once military hostilities or situations of occupation come to an end, the parties to a conflict must ensure the return of all internees to their last place of residence, or facilitate their repatriation.<sup>618</sup> For that purpose, they may set up committees to search for dispersed internees.<sup>619</sup> In any case, however, civilian internees remain protected under the Fourth Geneva Convention and the fundamental guarantees set out in Article 75 of Additional Protocol I until their final release, repatriation or return, even after the end of the armed conflict.<sup>620</sup>

### ***Continued detention***

The only protected persons who may be held on the territory of a party to the conflict beyond the close of hostilities are those against whom penal

610 GC IV, Art. 130; CIHL, Rule 115.

611 GC IV, Art. 131(1); CIHL, Rule 116.

612 GC IV, Art. 131(2).

613 GC IV, Art. 131(3).

614 GC IV, Art. 132(2); See also CIHL, commentary on Rule 128.

615 GC IV, Art. 133(1); CIHL, Rule 128 B.

616 GC III, Art. 118(1).

617 J.S. Pictet (ed.), *Commentary on the Fourth Geneva Convention, op. cit.* (note 387), p. 515.

618 GC IV, Art. 134.

619 GC IV, Art. 133(3).

620 GC IV, Art. 6(4); AP I, 75(6).

proceedings are pending, or who are serving a sentence, for offences not exclusively subject to disciplinary penalties. Such persons may be detained until the close of such proceedings and, if necessary, until they have served their sentence.<sup>621</sup> Strictly speaking, of course, such deprivation of liberty constitutes criminal detention or punitive imprisonment, but no longer internment within the meaning of IHL. Nevertheless, even as criminal convicts, the persons concerned continue to benefit from their status as protected persons until their final release, repatriation or return.

## 2. Treatment and conditions of internment

### (a) Responsibility and humane treatment

#### *Responsibility of the detaining power*

Irrespective of any individual responsibility, parties to a conflict remain responsible for the treatment accorded by their agents to protected persons.<sup>622</sup> Internees may lawfully be transferred to another State only if the latter is willing and able to grant them the protection to which they are entitled under IHL, but in no case may they be transferred out of an occupied territory.<sup>623</sup> When internees are lawfully transferred to another State, responsibility for their protection passes to the receiving State for such time as they are in its custody. However, if that State fails to fulfil its obligations under IHL in any important respect,<sup>624</sup> the original detaining power must take effective measures to correct the situation or ensure that the internees in question are returned to its jurisdiction.<sup>625</sup>

#### *Humane treatment*

Protected persons are entitled, in all circumstances, to respect for their physical and psychological integrity, their honour, their family rights, their religious convictions and practices, and their manners and customs. They must be treated humanely at all times, and protected, especially against all acts of violence or threats thereof and against insults and public curiosity.<sup>626</sup> More specifically, IHL prohibits any violence to life, health, or the physical or mental well-being of protected persons, in particular murder, torture, corporal punishment, mutilation, outrages against human dignity, hostage-taking, collective punishment, as well as threats to engage in any of these acts.<sup>627</sup>

621 GC IV, Art. 133(2); CIHL, Rule 128 *in fine*.

622 GC IV, Art. 29.

623 GC IV, Arts 45(1) and (3), and 49; CIHL, Rule 129 A.

624 For examples, see J. Pictet (ed.), *Commentary on the Fourth Geneva Convention*, *op. cit.* (note 387), p. 269.

625 GC IV, Art. 45(3). On transfers of protected persons, see also Chapter 5.III.2.g.

626 GC IV, Arts 27(1) and 37; CIHL, Rule 87.

627 AP I, Art. 75(2); CIHL, Rules 89–93, 96 and 103.

This also includes the prohibition of any form of physical or psychological coercion, in particular to obtain information,<sup>628</sup> of reprisals and measures of intimidation and terrorism,<sup>629</sup> and of unjustified medical or scientific experiments and any other form of brutality.<sup>630</sup> Humane treatment also includes protection against any form of sexual violence or abuse.<sup>631</sup> Apart from differences justified by their state of health, age and sex, all protected persons must be treated with the same consideration, without any adverse distinction based on race, religion, political opinion or similar criteria.<sup>632</sup>

### (b) Conditions of internment

#### *Places of internment*

Places of internment may not be set up in areas particularly exposed to the hostilities.<sup>633</sup> In order to protect internees from direct attacks and the incidental effects of hostilities, places of internment should be marked – in such a way as to make them clearly visible – by the letters “IC” and their location communicated to the opposing party.<sup>634</sup> In addition, places of internment exposed to air raids and other dangers of war must be equipped with shelters and, more generally, must benefit from the same protective measures as the general population.<sup>635</sup> In no case may protected persons be used as “human shields” to render certain objects or areas immune from military operations.<sup>636</sup>

Internees must be accommodated and administered separately from prisoners of war and from persons deprived of their liberty for any other reason, most notably in connection with criminal offences.<sup>637</sup> Moreover, as far as possible, internees should be grouped according to their nationality, language and customs.<sup>638</sup> Women must be accommodated separately from men and, in any case, must have separate sleeping quarters and sanitary conveniences and be under the immediate supervision of other women.<sup>639</sup> Similarly, interned

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628 GC IV, Art. 31; CIHL, Rule 90.

629 GC IV, Art. 33; CIHL, Rule 146.

630 GC IV, Art. 32; Rule 92.

631 GC I–IV, common Art. 3; GC IV, Art. 27(2); AP I, Art. 75; CIHL, Rules 93 and 134.

632 GC IV, Art. 27(3); CIHL, Rule 88.

633 GC IV, Art. 83(1); CIHL, Rule 121.

634 GC IV, Art. 83(2) and (3).

635 GC IV, Art. 88.

636 GC IV, Art. 28. On the prohibition and consequences of using human shields, see also AP I, Art. 51(7) and (8), CIHL, Rule 97, and Chapter 3.I.3.d.

637 GC IV, Art. 84.

638 GC IV, Art. 82(1).

639 GC IV, Art. 85(4); AP I, Art. 75(5); CIHL, Rule 119.

children must be accommodated separately from adults.<sup>640</sup> Nevertheless, members of the same family must be accommodated together in the same place of internment and, wherever possible, separately from other internees, so as to allow for a proper family life.<sup>641</sup> This does not preclude temporary separation for reasons of employment, health or the enforcement of penal or disciplinary sanctions.<sup>642</sup>

### ***Basic needs***

The detaining power must provide protected persons – for the duration of their internment, and free of charge – sufficient food, drinking water and clothing to keep them in good physical and mental health, taking into account factors such as climate, age, sex, medical condition, employment and custom.<sup>643</sup> Within the financial means available to them, internees must also be allowed to purchase additional foodstuffs, soap, tobacco and similar articles at local market prices.<sup>644</sup> Premises used for the internment of protected persons must provide adequate standards of hygiene and health.<sup>645</sup> Internees must have access to free medical care corresponding to their needs.<sup>646</sup> At least once a month, medical inspections must be conducted to supervise the general state of health, nutrition and cleanliness of the internees and to screen them for contagious diseases.<sup>647</sup>

### ***Religion, recreation and study***

Within the disciplinary routine prescribed by the military authorities, internees must be allowed to freely exercise their religion and to attend the services of their faith in premises adequate for that purpose.<sup>648</sup> Internees who are ministers of their religion must be allowed to freely exercise their ministry among internees of the same religion, and must be given the facilities reasonably required to do so.<sup>649</sup> The detaining power must also encourage internees to engage in intellectual, educational and recreational activities, including sports and games, and provide them with the support and premises necessary for that purpose.<sup>650</sup> Most importantly, children and

640 AP I, Art 77(4); CIHL, Rule 120.

641 GC IV, Art. 82(3); CIHL, Rule 105.

642 GC IV, Art. 82(2).

643 GC IV, Arts 89 and 90; CIHL, Rule 118.

644 GC IV, Art. 87(1).

645 GC IV, Art. 85(1).

646 GC IV, Arts 91 and 95(3).

647 GC IV, Art. 92.

648 GC IV, Arts 86 and 93(1); CIHL, Rule 127.

649 GC IV, Art. 93(2).

650 GC IV, Art. 94(1).

young people must be allowed to attend schools either within the place of internment or outside, and special playgrounds must be reserved for them.<sup>651</sup>

### ***Command and discipline***

Every place of internment must be put under the authority of a responsible officer, chosen from the regular military forces or the regular civil administration of the detaining power, who will be responsible for ensuring that the provisions of the Fourth Geneva Convention are known to, and complied with, by the staff in charge of internees.<sup>652</sup> The text of the Fourth Geneva Convention and of any special agreement concluded between the belligerent parties must also be posted inside the place of internment in a language that the internees understand.<sup>653</sup> Likewise, every order and command addressed to individual internees must be given in a language that they understand.<sup>654</sup> Throughout their internment, protected persons remain subject to the disciplinary regime of their place of internment. Such regime must be consistent with humanitarian principles and may in no circumstances impose any physical exertion endangering the health of internees or involve their physical or moral victimization. In view of the experience of World War II, IHL specifically prohibits the identification of internees by tattooing or imprinting signs or markings on their bodies; it also prohibits prolonged standing and roll-calls, punishment drills, military drills and manoeuvres, and the reduction of food rations.<sup>655</sup>

### **(c) Labour, personal property and financial resources**

#### ***Work***

Internees can volunteer to work but, contrary to prisoners of war and protected persons who are not interned, cannot be compelled to work. Their use for tasks of a degrading or humiliating nature, or for work directly related to the conduct of military operations, is prohibited in all cases.<sup>656</sup> The detaining power may, however, require internees to do administrative and maintenance work in places of internment, or perform duties connected with the protection of internees against aerial bombardment or other war risks.<sup>657</sup> Whenever internees are employed for work, including in labour detachments, the detaining power remains fully responsible for all working conditions, for medical attention, for the payment of wages, and for ensur-

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651 GC IV, Art. 94(2) and (3).

652 GC IV, Art. 99(1).

653 GC IV, Art. 99(2) and (3).

654 GC IV, Art. 99(4).

655 GC IV, Art. 100; CIHL, Rule 92.

656 GC IV, Art. 95(1); CIHL, Rule 95.

657 GC IV, Art. 95(3).



ing the payment of compensation for occupational accidents and illnesses. The standards applied in this respect must be in accordance with national laws, regulations and practice and may not be inferior to those applied to comparable work by non-internees.<sup>658</sup>

### ***Personal property and financial resources***

The detaining power must provide all internees with regular allowances sufficient to purchase goods and articles such as tobacco and toiletries.<sup>659</sup> In addition, and subject to the prohibition against unjustified discrimination among protected persons,<sup>660</sup> internees must be permitted to receive allowances from their country of origin or allegiance, the Protecting Power, any organizations assisting them, or their families, as well as the income on their property in accordance with the law of the detaining power.<sup>661</sup> They must also be enabled to send money to their families or other dependents.<sup>662</sup> When protected persons are interned, money in excess of their daily requirements, and other valuables and objects in their possession, may be taken from them against proper receipt, and must be credited to their personal accounts or safeguarded on their behalf until their release.<sup>663</sup> Nevertheless, internees must be allowed to carry a certain amount of money on their person so as to enable them to make purchases additional to the provisions of the detaining power.<sup>664</sup> Internees must also be permitted to keep objects of personal use or sentimental value,<sup>665</sup> as well as their identity documents.<sup>666</sup>

### **(d) Relations with the world outside**

#### ***Transmission of information***

At the outset of every international armed conflict, each party must establish an official Information Bureau responsible for replying to all enquiries concerning protected persons in its power, and for transmitting, within the shortest possible period, the necessary information to their countries of nationality or residence through the Protecting Power and the ICRC's Central Tracing Agency.<sup>667</sup> In cases where the transmission of information might be detrimental to the protected person concerned or to his or her relatives, the information may be transmitted only to the Central Tracing

658 GC IV, Arts 95(4) and 96.

659 GC IV, Art. 98 (1).

660 GC IV, Art. 27(3); CIHL, Rule 88.

661 GC IV, Art. 98(2).

662 GC IV, Art. 98(3).

663 GC IV, Art. 97(1), (2) and (5); CIHL, Rule 122.

664 GC IV, Art. 97(7).

665 GC IV, Art. 97(1) and (3); CIHL, Rule 122.

666 GC IV, Art. 97(6).

667 GC IV, Arts 136(1) and 137(1). See also GC IV, Art. 43(2); CIHL, Rules 105 and 123.



P. Barras/ICRC

Kerevat Prison, Papua New Guinea, 2012. Employees from the ICRC and the Papua New Guinea Red Cross Society explain to detainees how to fill in Red Cross messages to their families.

Agency, along with an explanation of the particular circumstances of the case.<sup>668</sup> The duty to inform covers all protected persons who are held in custody for more than two weeks, who are subject to assigned residence or who are interned, and includes changes such as transfers, releases, repatriations, escapes, admission to hospital, births and deaths.<sup>669</sup> The information transmitted must include all elements required to identify and locate the persons interned and to inform their families.<sup>670</sup>

### *Exercise of civil capacity*

During their internment, protected persons retain their full civil capacity and can exercise all rights that are compatible with their current status and applicable laws.<sup>671</sup> In particular, they should be enabled to manage their property,<sup>672</sup> to send and receive legal documents<sup>673</sup> and to consult a lawyer whenever necessary.<sup>674</sup> Subject to legal limits, the detaining power must also take all steps to ensure protected persons are not prejudiced

668 GC IV, Art. 137(2).

669 GC IV, Art. 136(2).

670 GC IV, Art. 138.

671 GC IV, Art. 80.

672 GC IV, Art. 114.

673 GC IV, Art. 113(1).

674 GC IV, Art. 113(2).

by their internment in the preparation and conduct of court proceedings they may be party to, or in the execution of any judicial decision.<sup>675</sup>

### ***Correspondence, shipments and visitors***

Immediately upon internment, but no later than one week after arrival or transfer to a place of internment or hospital, every internee must be enabled to send an internment card to his family and to the Central Tracing Agency, informing them of his detention, address and state of health.<sup>676</sup> Throughout their internment and subject to censorship, protected persons also have the right to send and receive correspondence, and to receive individual and collective relief shipments according to standards that essentially match those applicable to prisoners of war.<sup>677</sup> Unlike prisoners of war, however, internees are also allowed to receive visitors, especially close relatives, at regular intervals and as frequently as possible.<sup>678</sup> In urgent cases, such as the death or serious illness of relatives, internees may even be permitted to visit their homes.<sup>679</sup>

### ***Access for the Protecting Power and the ICRC***

Just as is the case for prisoners of war, representatives of the Protecting Power and delegates of the ICRC must be permitted to go to all places where protected persons are interned.<sup>680</sup> They must be allowed to interview the internees without witnesses, if necessary through an interpreter,<sup>681</sup> and to freely select the places they wish to visit.<sup>682</sup> The duration and frequency of these visits may not be restricted, and visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure.<sup>683</sup> Before the visits, the names of the ICRC delegates must be submitted for approval to the detaining power.<sup>684</sup>

### **(e) Derogations under Article 5 of the Fourth Geneva Convention**

As a general rule, the protection afforded by IHL cannot be derogated from without express treaty provisions to the contrary. The Fourth Geneva Convention contains an important derogation clause for cases where a protected

675 GC IV, Art. 115.

676 GC IV, Art. 106; CIHL, Rules 105 and 125.

677 GC IV, Arts 107–113; CIHL, Rule 125. See also Section II.3.d.

678 GC IV, Art. 116(1); CIHL, Rule 126.

679 GC IV, Art. 116(2).

680 GC IV, Art. 143(1); CIHL, Rule 124.

681 GC IV, Art. 143(2).

682 GC IV, Art. 143(4).

683 GC IV, Art. 143(3).

684 GC IV, Art. 143(5).

person is definitely suspected of or has engaged in espionage,<sup>685</sup> sabotage<sup>686</sup> or other activities hostile to the detaining power. In occupied territory, such persons can be deprived of their “rights of communication” if “absolute military security so requires,”<sup>687</sup> whereas within a belligerent party’s own territory, they can be deprived of “such rights and privileges (...) as would (...) be prejudicial to the security of such State.”<sup>688</sup>

Although formulated in fairly broad terms, this provision does not provide the detaining power with an unlimited right of derogation. First, reservations in the relevant treaty provision itself specify that the fundamental IHL guarantees of humane treatment and a fair and regular trial may not be derogated from under any circumstances.<sup>689</sup> Second, the derogable rights and privileges of the protected person referred to in the clause must be distinguished from the mutual obligations of the belligerent parties, which are not subject to derogation. Most notably, the duty of the detaining power to provide information on each internee to the country of origin or, at least, to the Central Tracing Agency cannot be derogated from.<sup>690</sup> Third, in the case of occupied territories, the possibility of derogation is already restricted to the individual right to communication of protected persons detained as spies.<sup>691</sup> Moreover, even suspected spies must be granted access to a qualified lawyer for the purpose of their defence in penal proceedings, whether in national or in occupied territory.<sup>692</sup> Hence, it is hard to see what other individual rights and privileges could be suspended for security reasons without seriously infringing the absolute rights to humane treatment and a fair trial. Fourth, the clause itself provides that any derogatory measure must be lifted “at the earliest date consistent with the security of the State or Occupying Power.”<sup>693</sup>

In sum, while it may be necessary and justified to hold suspected spies in solitary confinement and temporarily suspend their right to communicate with the world outside, whether through correspondence or by receiving visits, such measures may not exceed what is absolutely required for the security

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685 For the definition of the term “spy,” see Hague Regulations, Art. 29, in conjunction with AP I, Art. 46.

686 For the definition of the term “sabotage,” see J.S. Pictet (ed.), *Commentary on the Fourth Geneva Convention*, *op. cit.* (note 387), p. 57.

687 GC IV, Art. 5(2).

688 GC IV, Art. 5(1).

689 See also AP I, Art. 75(1), (2), (3) and (4); CIHL, Rules 87 and 100, and commentary on Rule 107.

690 See Section III.2.d.

691 GC IV, Art. 5(2); AP I, Art. 45(3).

692 GC IV, Arts 72(1) and (2), and 126; AP I, Art. 75(4)(a).

693 GC IV, Art. 5(3).

of the detaining power, both in terms of scope and of duration.<sup>694</sup> Moreover, the terms of the derogation clause itself, most notably the reservations guaranteeing humane treatment and a fair and regular trial, and the continuing obligation of the detaining power to provide information on every internee, effectively ensure that this clause cannot be used to formally justify any form of secret detention, ill-treatment or summary justice.

#### (f) Relations with the authorities

##### *Petitions, complaints and internee committees*

Internees have an unrestricted right to file petitions and complaints with the detaining authorities or the Protecting Power with regard to their conditions of internment.<sup>695</sup> Their interests are represented before the detaining authorities, the Protecting Power, the ICRC and other relevant organizations by an internee committee freely elected by the internees themselves and approved by the detaining authorities.<sup>696</sup> Internee committees may send periodic reports on the situation and needs in places of internment to the Protecting Power,<sup>697</sup> and the detaining power must afford them the time, facilities and freedom of movement they need to accomplish their duties in terms of inspection, representation and communication.<sup>698</sup>

##### *Disciplinary and judicial authority*

Within the boundaries of IHL, internees are subject to the laws in force in the territory in which they are detained.<sup>699</sup> In some respects, however, internees receive preferential treatment. For example, the Fourth Geneva Convention provides that, when fixing the penalty for an offence committed by an internee, the courts or authorities must take into account that the defendant is not a national of the detaining power and should not be bound by the minimum penalties prescribed in national law.<sup>700</sup> The detaining power must also notify the internee committee of any judicial proceedings instituted against any internee, and of their result.<sup>701</sup>

##### *Disciplinary procedures*

The judicial guarantees and the rules governing the execution of penal sanctions against internees are the same as those afforded to protected persons

694 J.S. Pictet (ed.), *Commentary on the Fourth Geneva Convention*, *op. cit.* (note 387), p. 56.

695 GC IV, Art. 101.

696 GC IV, Arts 102 and 103.

697 GC IV, Art. 101(4).

698 GC IV, Art. 104.

699 GC IV, Art. 117(1).

700 GC IV, Art. 118(1).

701 GC IV, Art. 118(5).

who are not interned.<sup>702</sup> As far as disciplinary procedures are concerned, internees benefit from a number of judicial guarantees listed in the Fourth Geneva Convention.<sup>703</sup> The commander of the place of internment must maintain a record of disciplinary punishments, which must be open to inspection by representatives of the Protecting Power.<sup>704</sup>

### ***Prohibition of cruel, inhuman or degrading punishment***

Any internee convicted for a disciplinary or criminal offence remains under the protection of IHL, also as far as the choice and execution of the penalty is concerned. Most importantly, disciplinary punishments may in no case be inhuman, brutal or dangerous to the health of internees,<sup>705</sup> and collective punishment for individual acts,<sup>706</sup> corporal punishment,<sup>707</sup> imprisonment in premises without daylight, and, in general, all forms of cruelty are prohibited without exception.<sup>708</sup> Finally, internees who have served disciplinary or judicial sentences may not be treated differently from other internees.<sup>709</sup>

### **(g) Transfers of internees**

In principle, the detaining power may lawfully transfer internees between places of internment, whether within the territory under its control or to another country willing and able to afford the internees the protection they are entitled to under IHL. This possibility is subject to two important restrictions. First, protected persons may not be transferred or deported from occupied territory.<sup>710</sup> Second, the principle of *non-refoulement* applies to all transfers or deportations.<sup>711</sup> When internees are lawfully transferred to another State, the responsibility for their protection passes to the receiving State for such time as they are in its custody. If that State fails to fulfil its obligations under IHL in any important respect, however, the original detaining power must take effective measures to correct the situation or ensure that the internees in question are returned to its jurisdiction.<sup>712</sup> Any such transfer of internees must be conducted humanely and under conditions at least equal to those applied to the armed forces of the detaining power during their changes of station. In particular, internees must be provided

702 See Chapter 6.I.1.

703 GC IV, Arts 117(3), 123(2) and 124(1).

704 GC IV, Art. 123(5).

705 GC IV, Art. 119(2); CIHL, Rule 90.

706 GC IV, Art. 33; CIHL, Rule 103.

707 GC IV, Art. 32; CIHL, Rule 91.

708 GC IV, Art. 118(2); CIHL, Rule 90.

709 GC IV, Art. 118(3).

710 GC IV, Art. 49; CIHL, Rule 129 A. See Chapter 6.III.2.c.

711 GC IV, Art. 45(4). See Chapter 6.II.2.

712 GC IV, Art. 45(3).

with adequate means of transport, and with the necessary food, water, clothing and medical care. Moreover, suitable precautions must be taken to ensure the safety of protected persons.<sup>713</sup>

### 3. Criminal procedures and detention

In parallel to internment as a preventive security measure, parties to an international armed conflict must run a detention system for the investigation, trial and punishment of criminal offences by protected persons, whether in occupied territory or within their national borders. Of course, protected persons who are detained continue to benefit from the general protection afforded by the Fourth Geneva Convention, particularly as concerns humane treatment.

#### *Judicial guarantees*

The Fourth Geneva Convention and Additional Protocol I formulate the fundamental fair-trial guarantees for the prosecution and punishment of criminal offences related to the armed conflict.<sup>714</sup> These guarantees are considered to have attained customary nature in both international and non-international armed conflicts.<sup>715</sup> As a matter of procedure, anyone accused of a criminal offence related to the armed conflict must be presumed innocent until proved guilty according to law.<sup>716</sup> He must be informed without delay of the allegations brought against him and must be afforded all the means and rights necessary to prepare and conduct his defence.<sup>717</sup> In particular, he is entitled to be tried in his presence<sup>718</sup> and must be permitted to examine witnesses.<sup>719</sup> No one can be convicted of an offence except on the basis of individual penal responsibility,<sup>720</sup> and no one can be compelled to testify against himself or to confess guilt.<sup>721</sup> No one can be prosecuted or punished more than once for the same offence,<sup>722</sup> or for an act or omission that did not constitute a criminal offence when it was committed.<sup>723</sup> Also, no heavier penalty may be imposed than was permissible at the time of the offence, and offenders must benefit from changes in the law providing for the possibility

713 GC IV, Art. 127.

714 GC IV, Arts 71–76 and 126; AP I, Art. 75(4).

715 CIHL, Rule 100 and commentary.

716 AP I, Art. 75(4)(d); CIHL, Rule 100.

717 GC IV, Arts 71(2) and 72; AP I, Art. 75(4)(a); CIHL, Rule 100.

718 AP I, Art. 75(4)(e); CIHL, Rule 100.

719 GC IV, Art. 72; AP I, Art. 75(4)(g); CIHL, Rule 100.

720 AP I, Art. 75(4)(b); CIHL, Rule 102.

721 AP I, Art. 75(4)(f); CIHL, Rule 100.

722 AP I, Art. 75(4)(h); CIHL, Rule 100.

723 AP I, Art. 75(4)(c); CIHL, Rule 101.

of a lighter penalty than was permissible at the time of the offence.<sup>724</sup> The Fourth Geneva Convention and Additional Protocol I also contain specific provisions on the death penalty; Additional Protocol I imposes specific restrictions in this respect with regard to pregnant women and mothers of dependant infants and children under 18 years of age.<sup>725</sup> Finally, any person convicted of an offence must be advised of his judicial and other remedies<sup>726</sup> and is entitled to have the judgment pronounced publicly.<sup>727</sup> In principle, representatives of the Protecting Power are entitled to attend the trial of any protected person. Exceptions can be made only where security considerations absolutely require closed hearings.<sup>728</sup>

### *Conditions of detention*

In situations of belligerent occupation, protected persons accused of offences must be detained and, if convicted, serve their sentences within the occupied country.<sup>729</sup> As their offences will often be rooted in patriotic motives, they should, to the extent possible, be separated from other detainees.<sup>730</sup> Wherever protected persons are detained, women must be held in separate quarters from men, under the direct supervision of other women.<sup>731</sup> Similarly, children held for reasons related to the armed conflict must be accommodated separately from adults<sup>732</sup> and must be afforded the special treatment required by their age.<sup>733</sup> All protected persons detained must be afforded conditions of detention that are at least equal to those prevailing in other prisons in the relevant territory. In all cases, they must receive the food, hygiene and medical attention necessary to keep them in good health,<sup>734</sup> and must be permitted to receive spiritual assistance,<sup>735</sup> and at least one individual relief parcel per month.<sup>736</sup> Protected persons who are detained have the same right as internees to be visited by delegates of the Protecting Power and of the ICRC.<sup>737</sup>

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724 AP I, Art. 75(4)(c); CIHL, Rule 101.

725 GC IV, Art. 75; AP I, Arts 76(2) and (3), and 77(5); CIHL, Rule 134.

726 GC IV, Art. 73; AP I, Art. 75(4)(j); CIHL, Rule 100.

727 AP I, Art. 75(4)(i); CIHL, Rule 100.

728 GC IV, Arts 71(2) and 74; CIHL, Rule 100.

729 GC IV, Art. 76(1).

730 GC IV, Art. 76(1).

731 GC IV, Art. 76(4); AP I, Art. 75(5); CIHL, Rule 119.

732 AP I, Art. 77(4); CIHL, Rule 120.

733 GC IV, Art. 76(5).

734 GC IV, Art. 76(1) and (2); CIHL, Rule 118.

735 GC IV, Art. 76(3).

736 GC IV, Art. 76(7).

737 GC IV, Art. 76(6); CIHL, Rule 124.



### ***End of detention***

At the end of an occupation, protected persons accused of offences or convicted by the courts in occupied territory must be handed over, with the relevant records, to the authorities of the liberated territory.<sup>738</sup> Protected persons detained in relation to criminal offences within the territory of a party to the conflict may ask to leave such territory as soon as they are released.<sup>739</sup> In any case, protected persons who are detained pending penal proceedings or serving a sentence for a criminal offence continue to benefit from the protection of the Fourth Geneva Convention until their final release, repatriation or return to their place of residence, even after the end of an armed conflict.<sup>740</sup> Persons detained for reasons related to an armed conflict without being entitled to a status specifically protected under the Geneva Conventions, such as the detaining power's own nationals who may have collaborated with the enemy, likewise benefit from the fundamental guarantees of IHL with regard to humane treatment and fair trial until their final release, repatriation or return.<sup>741</sup>

### **To go further (Internment and detention of civilians)<sup>742</sup>**

- Cordula Droege, "[Transfer of detainees: Legal framework, non-refoulement and contemporary challenges](#)," *IRRC*, Vol. 90, No. 871, September 2009, pp. 669–701.
- Jelena Pejic, "[Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence](#)," *IRRC*, Vol. 87, No. 858, June 2005, pp. 375–391.
- Ryan Goodman, "The detention of civilians in armed conflicts," *American Journal of International Law*, Vol. 103, No. 1, January 2009, pp. 48–74.
- Ministry of Foreign Affairs of Denmark, "The Copenhagen Process on the handling of detainees in international military operations," *Revue de droit militaire et de droit de la guerre*, Vol. 3–4, No. 46, 2007, pp. 363–392.

738 GC IV, Art. 77.

739 GC IV, Art. 37(2).

740 GC IV, Art. 6(4).

741 AP I, Art. 75(6); CIHL, Rule 87.

742 All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

### *How Does Law Protect in War?*

- Case No. 121, [Bangladesh/India/Pakistan, 1974 Agreement](#)
- Case No. 130, [Methods of Interrogation Used Against Palestinian Detainees](#)
- Case No. 162, [Eritrea/Ethiopia, Award on Civilian Internees and Civilian Property](#)
- Case, [ECHR, Al-Jedda v. UK](#) (only available online)

## IV. SPECIFIC ISSUES ARISING IN NON-INTERNATIONAL ARMED CONFLICTS

### 1. Lack of status and privilege

IHL governing non-international armed conflicts uses the terms “civilian,” “armed forces,” “dissident armed forces” and “organized armed groups,” but distinguishes between these categories of person primarily for the purposes of the conduct of hostilities, and without any implications for the rights and treatment of those deprived of their liberty.<sup>743</sup> This means that the rules of IHL governing the protection of persons deprived of their liberty for reasons related to non-international armed conflicts are equally applicable to all persons captured, detained or interned, regardless of their status or involvement in the conduct of hostilities, and regardless of whether they are held by a State or by non-State parties.<sup>744</sup>

It also means that, in non-international armed conflicts, IHL provides no privilege of combatancy granting immunity from prosecution for lawful acts of war. Consequently, any person having directly participated in hostilities in a non-international armed conflict remains exposed to the full force of the applicable national law. Normally, any harm caused by the governmental armed forces and police in compliance with IHL will be justified under national law as lawful acts of the State, whereas any harm caused by non-State armed groups and civilians supporting them will generally be subject to prosecution under the standard provisions of national law. IHL simply recommends that, at the end of hostilities, the authorities in power “endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons

<sup>743</sup> See GC I–IV, common Art. 3(1); AP II, Arts 1(1) and 13(1).

<sup>744</sup> GC I–IV, common Art. 3(1); AP II, Arts 4 and 5; CIHL, Rules 87 and 118–128.

related to the armed conflict,” with the exception of persons suspected of, accused of or sentenced for war crimes.<sup>745</sup>

## 2. Treatment, conditions and procedures

### (a) Treatment and conditions of detention or internment

As we have seen, in situations of non-international armed conflict, common Article 3 and Article 4 of Additional Protocol II contain fundamental guarantees for all persons not or no longer taking a direct part in hostilities. Article 5 of Additional Protocol II contains additional provisions aimed at ensuring a minimum standard of humane treatment for persons who are interned or detained for reasons related to a non-international armed conflict.<sup>746</sup>

Accordingly, to the same extent as the local civilian population, detainees and internees must be provided with food, drinking water, hygiene and health care, and protected against the weather and the dangers arising from the armed conflict.<sup>747</sup> The wounded and sick must receive the medical care required by their condition, without any distinction among them other than on medical grounds.<sup>748</sup> No persons deprived of their liberty may be subjected to medical procedures that are not required by their state of health or that are inconsistent with generally accepted medical standards.<sup>749</sup> Detainees and internees must be allowed to receive individual or collective relief shipments, to practice their religion and to receive spiritual assistance.<sup>750</sup> If made to work, their working conditions and safeguards must be similar to those enjoyed by the local civilian population.<sup>751</sup> Moreover, except when families are accommodated together, women must be held in quarters separate from those of men and under the immediate supervision of other women.<sup>752</sup> Subject to the restrictions deemed necessary by the competent authority, detainees and internees must also be allowed to communicate with the world outside.<sup>753</sup>

745 AP II, Art. 6(5); CIHL, Rule 159.

746 AP II, Art. 5(1); CIHL, Rule 87.

747 AP II, Art. 5(1); CIHL, Rule 118.

748 AP II, Arts 5(1)(a) and 7(2); CIHL, Rule 88.

749 AP II, Art. 5(2)(e); CIHL, Rule 92.

750 AP II, Art. 5(1)(d); CIHL, Rule 127.

751 AP II, Art. 5(1)(e); CIHL, Rule 95.

752 AP II, Art. 5(2)(a); CIHL, Rule 119.

753 AP II, Art. 5(2)(b); CIHL, Rule 125.

Places of internment and detention must be situated at a safe distance from the combat zone and, when they become particularly exposed to dangers arising from the armed conflict, evacuated, provided that such evacuation can be carried out under adequate conditions of safety.<sup>754</sup> Likewise, once persons deprived of their liberty are released, those responsible for the decision must do what is needed to ensure their safety.<sup>755</sup>

Finally, persons whose liberty is restricted by security measures such as house arrest, assigned residence or other forms of surveillance not involving physical custody must be afforded the same protections as detainees and internees except, of course, the provisions related to the material conditions of their detention.<sup>756</sup>

### (b) Judicial guarantees and procedural safeguards

In situations of non-international armed conflict, administrative and judicial procedures, along with the determination and execution of sanctions by the State authorities concerned, are generally regulated by national law. IHL is not intended to replace such national provisions; instead, it seeks to establish a minimum standard that must be respected by all parties to a conflict, including organized armed groups, regardless of national law.

#### *Judicial guarantees in penal proceedings*

Common Article 3 prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>757</sup> Article 6 of Additional Protocol II further develops this requirement and formulates the most fundamental fair-trial guarantees for the prosecution and punishment of criminal offences related to the conflict.<sup>758</sup> Accordingly, courts adjudicating criminal cases must offer guarantees of independence and impartiality, allow the accused to be tried in his presence and presume his innocence until proved guilty according to law. As a matter of procedure, the accused must be informed without delay of the allegations against him and must be afforded all the means and rights necessary to prepare and conduct his defence. No one can be convicted of an offence except on the basis of individual penal responsibility, and no one can be compelled to testify against himself. No one can be held guilty for any act or omission that did not constitute a criminal offence at the time it was committed, and no heavier penalty may be imposed than was permissible at the time of the offence.

754 AP II, Art. 5(2)(c); CIHL, Rule 121.

755 AP II, Art. 5(4).

756 AP II, Art. 5(3); Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols*, *op. cit.* (note 186), para 4595.

757 GC I–IV, common Art. 3(1).

758 AP II, Art. 6(1).

Offenders must benefit from changes in the law providing for the possibility of a lighter penalty than was permissible at the time of the offence.<sup>759</sup> In no case can the death penalty be pronounced on persons who were under the age of 18 at the time of the offence, or carried out on pregnant women or mothers of young children.<sup>760</sup> Any person convicted of an offence must be advised of his judicial and other remedies.<sup>761</sup> In this context, it should also be pointed out that excessively long conflict-related judicial proceedings can have severe humanitarian consequences for the individual concerned. They will also have very serious consequences for the proper functioning of places of detention: Rwanda and the Philippines are recent examples of States affected by internal armed conflicts where delays in the processing of judicial cases contributed to significant problems of overcrowding in various places of detention.<sup>762</sup>

### *Procedural safeguards for internment*

While IHL governing non-international armed conflicts clearly refers to the possibility of internment,<sup>763</sup> i.e. of preventive detention for security reasons without criminal charge, it fails to expressly regulate internment. While there can be no doubt that internees benefit from the general provisions governing the treatment and conditions of detention of persons deprived of their liberty in non-international armed conflicts, treaty IHL remains silent as to the procedural safeguards afforded to internees during procedures concerning the initiation and review of their internment. Some guidance can be drawn from the rules applicable to internment in situations of international armed conflict. After all, common Article 3 encourages parties to a conflict to conclude special agreements giving effect to all or part of the other provisions of the Conventions in non-international armed conflicts as well.<sup>764</sup> In the view of the ICRC, the most important of these provisions have in any case attained customary nature in non-international armed conflicts, too.<sup>765</sup> At least to the extent that they are designed to safeguard the principles of humanity and the dictates of public conscience referred to in the Martens Clause, they would arguably have to be regarded as binding also in non-international armed conflicts.<sup>766</sup> For example, it would be difficult to reconcile a person's indefinite internment for security reasons with elementary considerations of humanity, unless the continued existence of

759 AP II, Art. 6(2); CIHL, Rule 101.

760 AP II, Art. 6(4).

761 AP II, Art. 6(3); CIHL, Rule 100.

762 See "[Philippines: Protecting life and dignity in places of detention](#)," ICRC operational update, 3 February 2010, and "[Rwanda: 1995 Retrospective Newsletter](#)," ICRC, 26 January 1996.

763 AP II, Art. 5.

764 GC I–IV, common Art. 3(3).

765 CIHL, Rule 99.

766 For more details on the Martens Clause, see Chapter 1.II.3.



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Detainees return to Rubavu Prison, in Ginsenyi, Rwanda, after a day's work, 2014.

the security threat justifying such a measure is the object of periodic reviews by a competent court or administrative body. Also, wherever IHL governing international armed conflicts refers to internment, it describes it as the most severe security measure at the disposal of a belligerent party, one that may be taken only for imperative reasons of security subject to periodic review.<sup>767</sup> It may reasonably be concluded, therefore, that internment must always remain a temporary measure of last resort in non-international armed conflicts as well. Of course, when persons are interned by a governmental party to a conflict, they will also benefit from the protection of human rights law and the standards developed in the case-law of treaty-based human rights bodies. Thus, both IHL and human rights law complement national law in regulating internment and other forms of security detention in situations of non-international armed conflict.

<sup>767</sup> GC IV, Arts 41(1) and 78(1).

## Textbox 8: Procedural safeguards for internment/administrative detention

In 2005, the ICRC adopted an institutional legal and policy position entitled “Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence.” This document was annexed to an ICRC report, *IHL and the Challenges of Contemporary Armed Conflicts*, that was presented to the 30th International Conference of the Red Cross and Red Crescent in 2007; it provides guidance to the ICRC’s delegations in their operational dialogue with States and non-State armed groups.<sup>768</sup> In 2011, another ICRC report, entitled *Strengthening Legal Protection for Victims of Armed Conflicts*, was submitted to the 31st International Conference: it identified the protection of persons deprived of their liberty, including procedural safeguards in internment, as one of four areas that should be strengthened by developing existing IHL.<sup>769</sup> The Conference adopted a resolution inviting the ICRC to continue its efforts, in consultation with States and other parties, “to identify and propose a range of options and its recommendations to: (...) ensure that international humanitarian law remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict.”<sup>770</sup> After having made its recommendations to the 32nd International Conference in December 2015, the ICRC was invited to continue its work to facilitate consultations on this issue, with a view to producing concrete and implementable outcomes, though of a legally non-binding nature.

- For further details, see the 2005 position paper entitled “Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence,” available at: [https://www.icrc.org/eng/assets/files/other/irrc\\_858\\_pejic.pdf](https://www.icrc.org/eng/assets/files/other/irrc_858_pejic.pdf)
- See also “Detention in non-international armed conflict: The ICRC’s work on strengthening legal protection,” webpage, ICRC. Available at: <https://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-ihl-detention.htm>

768 Jelena Pejić, “Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence,” *IRRC*, Vol. 87, No. 858, June 2005, pp. 375–391.

769 31st International Conference of the Red Cross and Red Crescent, Geneva, Draft Resolution and Report, *Strengthening legal protection for victims of armed conflicts*, October 2011. Available at: <http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-strengthening-legal-protection-11-5-1-1-en.pdf>

770 31st International Conference of the Red Cross and Red Crescent, Geneva, 28 November–1 December 2011, Resolution 1, *Strengthening legal protection for victims of armed conflicts*, para. 6. Available at: <http://www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm>

### (c) Transfers of detainees

For the present purposes, the term “transfer” is used in the broadest possible sense, covering any handover of a person from the control of one belligerent party to that of another State or other authority, regardless of whether the individual crosses an international border. The transfer of persons deprived of their liberty has emerged as one of the defining features of non-international armed conflicts over the past decade, especially where multinational forces or extraterritorial military operations are concerned. Even in purely internal armed conflicts, the phenomenon of foreign nationals joining armed groups has increased the likelihood of States transferring conflict-related detainees back to their home governments.

Of course, humanitarian concerns about how detainees might be treated after they are handed over to another authority or government are not new. For instance, the Third and Fourth Geneva Conventions place specific constraints on the transfer of individuals to other States and impose obligations to ensure their appropriate treatment after transfer. Furthermore, detainees remain protected under the principle of *non-refoulement*, according to which no person may be transferred to a country or authority where he or she might be in danger of being subjected to torture or other forms of ill-treatment, arbitrary deprivation of life or persecution on account of his or her race, religion, nationality, political opinion or membership in a particular social group. The principle of *non-refoulement* is expressed, with some variation in scope, in a number of international legal instruments, including in IHL, refugee law, international human rights law, and some extradition treaties. It is also an essential principle of customary international law. Treaty IHL applicable in non-international armed conflicts contains no express reference to the principle of *non-refoulement*; but it would be consistent with the categorical prohibitions set out in common Article 3 to understand that provision as prohibiting the transfer of persons to places where there are substantial grounds for believing they will be in danger of being subjected to violence to life and person, such as torture and other forms of ill-treatment, or even murder.

→ On transfers in situations of international armed conflict, see Sections II.2.c (prisoners of war) and III.2.g (civilian internees) above.

### 3. Detention by non-State armed groups

By definition, all non-international armed conflicts involve at least one non-State armed group. This means that IHL must also regulate the treatment and protection of persons held by such groups.



**(a) Distinguishing hostage-taking from other forms of detention**

In practice, when government soldiers or civilians are captured and detained by non-State armed groups, States are often quick to accuse the latter of hostage-taking, an act that common Article 3 prohibits in all circumstances. While this description may be accurate as a matter of national criminal law, the concept of hostage-taking within the meaning of international law is far more restrictive. Although common Article 3 prohibits hostage-taking in all circumstances, the relevant definition is not found in IHL, but in international criminal law. Accordingly, hostage-taking is understood to denote the seizure or detention of any person, irrespective of status, combined with the threat to kill, injure or continue to detain the hostage, in order to compel a third party to do, or to abstain from doing, any act as an explicit or implicit condition for the release (or safety) of the hostage.<sup>771</sup> It is this specific intent that distinguishes hostage-taking from other forms of deprivation of liberty for reasons related to an armed conflict.<sup>772</sup>

**(b) Interpreting the obligations of non-State armed groups**

It may legitimately be asked to what extent it is realistic to expect dissident armed forces or organized armed groups to afford the protection of IHL to captured government soldiers or other persons in their custody. Clearly, the answer very much depends on the circumstances of each case. While a well-organized non-State armed group controlling part of a State's territory for a prolonged period can be expected to respect and implement its obligations under IHL to the letter, it may be significantly more difficult to do so for loosely organized armed groups operating clandestinely and without any significant control over territory or infrastructure. Of course, the fundamental guarantees of humane treatment certainly constitute absolute minimum standards to be respected by all weapon-bearers in all circumstances. It is less certain, however, that unsophisticated non-State armed groups can realistically be expected to afford persons in their custody the right to send and receive correspondence, to receive relief parcels, or to undergo regular medical examinations. Even where such groups exercise effective control over part of a State's territory, it remains open to doubt whether they could ever, as a matter of law, conduct valid judicial proceedings in accordance with the procedural requirements of IHL. The most realistic interpretation of the law as it currently stands probably would be that non-State armed groups must provide for the basic needs of persons detained by them to the same extent

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771 Rome Statute, Art. 8(2)(a)(viii) and (c)(iii); International Criminal Court, Elements of Crimes, War crime of taking hostages, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court*, First Session, 3–10 September 2002. See also International Convention against the Taking of Hostages, 17 December 1979, Art. 1.

772 CIHL, commentary on Rule 96.

as for those of the civilian population under their control or, in the absence of such control, to the same extent as for those of their own members.<sup>773</sup>

### To go further (Specific issues arising in non-international armed conflicts)<sup>774</sup>

- *Burundi: What the ICRC does for detainees during prison visits*, film, ICRC, 2013. Available at: <http://www.youtube.com/watch?v=vz1hhR5u9pA>
- “[Expert meeting on procedural safeguards for security detention in non-international armed conflict, Chatham House and International Committee of the Red Cross, London, 22–23 September 2008](#),” *IRRC*, Vol. 91, Number 876, December 2009, pp. 859–881.
- Deborah Casalin, “[Taking prisoners: Reviewing the international humanitarian law grounds for deprivation of liberty by armed opposition groups](#),” *IRRC*, Vol. 93, No. 883, September 2011, pp. 743–757.
- David Tuck, “[Detention by armed groups: Overcoming challenges to humanitarian action](#),” *IRRC*, Vol. 93, No. 883, September 2011, pp. 759–782.
- John B. Bellinger and Vijay M. Padmanabhan, “Detention operations in contemporary conflicts: Four challenges for the Geneva Conventions and other existing law,” *American Journal of International Law*, Vol. 105, No. 2, April 2011, pp. 201–243.
- Knut Dörmann, “Detention in non-international armed conflicts,” *International Law Studies*, Vol. 88, 2012, pp. 347–366.

### How Does Law Protect in War?

- Document No. 269, [United States, Treatment and Interrogation in Detention](#)
- Case No. 243, [Colombia, Constitutional Conformity of Protocol II](#), in particular question 7 b) and c)
- Case No. 260, [Afghanistan, Code of Conduct for the Mujahideen](#)

<sup>773</sup> AP II, Art. 5(1)(b); CIHL, commentary on Rule 118.

<sup>774</sup> All ICRC documents available at: [www.icrc.org](http://www.icrc.org)





# Chapter 6

## Civilians in enemy-controlled territory



ICRC

Viet Nam, 1972. Children in the south cross paths with US soldiers.

## Structure

- I. General protection of civilians in the power of the enemy
- II. Enemy nationals in the territory of a belligerent party
- III. Inhabitants of occupied territories
- IV. Humanitarian assistance
- V. Specific issues arising in non-international armed conflicts

### In a nutshell

- All civilians who find themselves in enemy-controlled territory must be treated humanely in all circumstances, and no security measures more severe than assigned residence or internment may be imposed on them.
- In occupied territories, the occupying power represents a *de facto* administrative authority that has a temporary right and duty to maintain public order and safety in accordance with the local laws already in force, but that may not introduce permanent changes to the social, demographic, geographical, political or economic order of the territory.
- IHL prohibits the use of starvation of the civilian population as a method of warfare, and obliges belligerent parties and non-belligerent States to allow and facilitate the delivery of impartial humanitarian relief consignments for any civilian population affected by a situation of international armed conflict.
- In situations of non-international armed conflict, the protection afforded by IHL is not tied to nationality, allegiance or status, but extends to all persons who are not, or no longer, taking a direct part in the hostilities.

### To go further<sup>775</sup>

- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, [Chapter 8: The protection of civilians](#), pp. 211–248.
- ICRC, [Enhancing Protection for Civilians in Armed Conflict and Other Situations of Violence](#), ICRC, 2012, 90 pp.
- “Protecting civilians,” webpage, ICRC. Available at: <https://www.icrc.org/en/what-we-do/protecting-civilians>

### How Does Law Protect in War?

- Case No. 61, [UN, Secretary-General’s Reports on the Protection of Civilians in Armed Conflict](#)

In the course of armed conflicts, the civilian population or individual civilians often find themselves within territory controlled by an adverse belligerent party. In international armed conflicts, this may be because the national territory of one State has been invaded and occupied by another, or because nationals of one belligerent party reside in the territory of another. In non-international armed conflicts, the belligerents and the civilian population generally have the same nationality, but may be divided into factions along ethnic, religious or political lines. Wherever civilians, their families and property find themselves in the effective military and administrative control of a belligerent enemy, there is a great risk that they will be treated arbitrarily and abused. Moreover, civilians affected by armed conflict are regularly deprived of the most basic goods and services essential to their survival, particularly where hostilities have caused a breakdown of public security and infrastructure, or where parts of the population have been displaced. In such situations, starvation, sickness and crime quickly take their toll and require, at the very least, immediate humanitarian assistance from the outside. IHL therefore devotes considerable attention to the protection of civilians who have fallen into the power of a belligerent party and to the duty of belligerents to allow and facilitate humanitarian assistance to any civilian population in need as a result of an armed conflict.

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775 All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

## I. GENERAL PROTECTION OF CIVILIANS IN THE POWER OF THE ENEMY

The fundamental rules and principles of IHL governing the protection of civilians who find themselves in the power of a belligerent party, whether in its national territory or in occupied territory, are laid down in Articles 27 to 34 of the Fourth Geneva Convention and Articles 72 to 79 of Additional Protocol I. Today, most of these provisions are recognized as having attained the status of customary law.<sup>776</sup>

### 1. Protected persons

In situations of international armed conflict, the main legal instrument protecting civilians in the power of the enemy is the Fourth Geneva Convention. As we saw in Chapter 5, this Convention focuses on the protection of persons who are not entitled to prisoner-of-war status and “who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”<sup>777</sup> Thus, the notion of “protected person” within the meaning of the Fourth Geneva Convention includes not only peaceful civilians, but also civilians who have directly participated in hostilities and, in principle, even members of the armed forces who for some reason have lost their entitlement to prisoner-of-war status.

→ On entitlement to prisoner-of-war status, see Chapter 5.I.2.

The Fourth Geneva Convention does not, however, oblige belligerent States to protect their own nationals, the nationals of neutral States within their territory, or the nationals of co-belligerent States, provided normal diplomatic relations are maintained with the State of nationality.<sup>778</sup>

→ On the precise scope of protection of the Fourth Geneva Convention, see Chapter 5.I.3.

It must be emphasized that even persons who fail to qualify both for prisoner-of-war status and for protection under the Fourth Geneva Convention remain protected by IHL. Most notably, Additional Protocol I provides that all persons affected by an international armed conflict who are in the power of a belligerent party, and who do not benefit from more favourable treatment under a specific status regime of IHL, must be treated humanely

<sup>776</sup> CIHL, Rules 52, 87–105 and 146.

<sup>777</sup> GC IV, Art. 4(1) and (4).

<sup>778</sup> GC IV, Art. 4(2). However, see also ICTY, *The Prosecutor v. Dusko Tadić*, *op. cit.* (note 70), paras 163–169.



in all circumstances and must benefit, as a minimum, from a number of fundamental guarantees, including judicial guarantees, that have become part of customary international law.<sup>779</sup> Moreover, there is a growing consensus that all persons finding themselves within the effective territorial control or physical custody of a belligerent State must be regarded as being within the jurisdiction of that State and, therefore, as benefiting from the protection of international human rights law. In sum, no persons finding themselves in the power of a party to an international armed conflict can fall outside the protection of IHL.

## 2. Basic duties and responsibilities of belligerents

Irrespective of any individual responsibilities that may exist, belligerent parties remain responsible for the treatment accorded by their agents to persons in their power.<sup>780</sup> Persons in the power of an adverse party to a conflict may in no circumstances, not even voluntarily, renounce the rights secured to them under IHL.<sup>781</sup>

### (a) Humane treatment and non-discrimination

Persons who are in the power of a belligerent party must be treated humanely at all times. In particular, they are entitled to respect for their person, honour, family rights, religious convictions and practices, and for their manners and customs, and must be protected against all acts or threats of violence, insults and public curiosity.<sup>782</sup> Accordingly, the following acts – or threats thereof – are prohibited “at any time and in any place whatsoever, whether committed by civilian or by military agents”:<sup>783</sup>

- violence to life and health, in particular murder, corporal punishment, physical or mental torture and mutilation;<sup>784</sup>
- pillage and outrages upon personal dignity, in particular humiliating or degrading treatment, and any form of sexual violence or abuse;<sup>785</sup>
- physical or moral coercion, in particular reprisals, hostage-taking, collective punishment, and measures of intimidation or terrorism.<sup>786</sup>

Differences in treatment may sometimes be justifiable on the grounds of health, age or sex; however, in all other circumstances, discrimination – on

779 See, in particular, AP I, Art. 75, and CIHL, Rules 87–105.

780 GC IV, Art. 29.

781 GC IV, Art. 8.

782 GC IV, Art. 27(1); AP I, Art. 75(1); CIHL, Rules 87 and 104–105.

783 AP I, Art. 75(2).

784 GC IV, Art. 32; AP I, Art. 75(2)(a); CIHL, Rules 89–92.

785 GC IV, Arts 27(2) and 33(2); AP I, Art. 75(2)(b); CIHL, Rules 52, 90 and 93.

786 GC IV, Arts 31, 33 and 34; AP I, Art. 75(2)(c), (d) and (e); CIHL, Rules 96, 103 and 146.

the basis of race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria – is strictly prohibited.<sup>787</sup>

**(b) Right to communicate**

***Communication with Protecting Powers or the ICRC***

Civilians in territory controlled by an adverse party to a conflict have the right to communicate individually or collectively with the Protecting Powers, the ICRC, the National Societies or any other organization able to assist them. Such communication may include suggestions, complaints, protests or requests for assistance, or take any other form appropriate in the circumstances.<sup>788</sup> Belligerent parties must facilitate visits by delegates of the Protecting Powers and of the ICRC, and, as much as possible, by representatives of other relief organizations.<sup>789</sup>

***Maintaining and restoring family links***

All persons in the territory controlled by a belligerent party must be enabled to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them,<sup>790</sup> if necessary through the assistance of the Central Tracing Agency and the National Societies.<sup>791</sup> The belligerent parties must also facilitate enquiries by members of families dispersed by the war, so that they can renew contact with one another and meet, if possible. The belligerent parties must encourage, in particular, the work of organizations engaged in this task, provided those organizations are acceptable to them and comply with their security regulations.<sup>792</sup>

**To go further (Restoring family links)<sup>793</sup>**

- *Afghanistan: Helping Families Stay in Touch*, film, ICRC, February 2014. Available at: <http://www.youtube.com/watch?v=XaNgpy3f1GQ>
- ICRC e-learning course, *Restoring Family Links and Psychosocial Support*. Available at: <http://familylinks.icrc.org/en/Pages/NewsAndResources/Resources/E-learning-RFLPSS.aspx>

787 GC IV, Arts 13 and 27(3); AP I, Art. 75(1); CIHL, Rule 88.

788 J.S. Pictet (ed.), *Commentary on the Fourth Geneva Convention*, *op. cit.* (note 387), p. 214.

789 GC IV, Art. 30.

790 GC IV, Art. 25(1); CIHL, Rule 105.

791 GC IV, Art. 25(2).

792 GC IV, Art. 26.

793 All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

- Olivier Dubois, Katharine Marshall and Siobhan Sparkes McNamara, “[New technologies and new policies: the ICRC’s evolving approach to working with separated families](#),” *IRRC*, Vol. 94, No. 888, December 2012, pp. 1455–1479.
- ICRC, *Restoring Family Links Strategy*, ICRC, Geneva, 2009, 64 pp.
- ICRC, *Accompanying the Families of Missing Persons: A Practical Handbook*, ICRC, Geneva, 2013, 158 pp.
- “Restoring Family Links,” webpage, ICRC. Available at: <http://www.icrc.org/eng/what-we-do/restoring-family-links/index.jsp>
- “Restoring Family Links,” Movement website. Available at: <http://familylinks.icrc.org/en/Pages/home.aspx>

### ***How Does Law Protect in War?***

- Document No. 34, [ICRC, Tracing Service](#)

### **3. Right to take security measures**

While IHL requires belligerent parties to respect and protect the civilian population in territory under their control, it also expressly recognizes their right to “take such measures of control and security in regard to protected persons as may be necessary as a result of the war.”<sup>794</sup> Depending on the circumstances, this may include a ban on carrying firearms, restrictions of movement within or outside certain areas, a duty to carry identity documents, or restrictions on political activities or on certain professions. While IHL does not provide an exhaustive list of permissible security measures, it specifies that, in any event, the most severe measures that may be imposed are those of assigned residence and internment (on internment, see Chapter 5).<sup>795</sup> The implicit criterion of necessity further suggests that security measures may not exceed what is reasonably required to achieve a legitimate security purpose in the circumstances. Also, regardless of any actual or perceived necessity, all security measures, including their specific purposes, components and foreseeable consequences, must always remain within the limits set by the fundamental guarantees and specific prohibitions derived from the general duty of humane treatment.<sup>796</sup> In sum, therefore, the broad wording of this provision may leave belligerent parties a considerable

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794 GC IV, Art. 27(4).

795 GC IV, Arts 41 and 78(1).

796 See Section 2.a.

amount of discretion, but does not amount to a general derogatory clause in favour of security considerations.<sup>797</sup>

#### 4. Special protection for specific categories of person

Apart from the fundamental guarantees owed to every human being in the power of a belligerent party, IHL affords special protection to various categories of person who, owing to their sex, age, profession or status, are particularly exposed to certain risks.

##### (a) Women

In time of war, women are often left to take care of children and other dependents on their own and under extremely difficult circumstances. In addition, they are particularly exposed to the risk of sexual violence and abuse by weapon-bearers or organized criminal groups. IHL therefore emphasizes that women must be “especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”<sup>798</sup> Moreover, the cases of pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict must be reviewed with the utmost priority.<sup>799</sup> To the maximum extent feasible, the death penalty should not be pronounced, and may in any case not be carried out, on such women.<sup>800</sup>

#### To go further (Women)<sup>801</sup>

- *Sexual Violence in Armed Conflicts: An Invisible Tragedy*, film, ICRC, March 2014. Available at: <http://www.youtube.com/watch?v=M0ER1uTt7VE>
- *Democratic Republic of the Congo: Rape Remains Rape, No Matter Who Did It*, film, ICRC, October 2014. Available at: <http://www.youtube.com/watch?v=OleLyA8-cGQ>
- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, [Chapter 8: The protection of civilians](#), pp. 213–217.
- Helen Durham and Tracey Gurd, *Listening to the Silences: Women and War*, Martinus Nijhoff, Leiden/Boston, 2005, 276 pp.
- “[Sexual Violence in armed conflict](#),” *IRRC*, Vol. 96 No. 894, Summer 2014.

797 See also J.S. Pictet (ed.), *Commentary on the Fourth Geneva Convention*, *op. cit.* (note 387), p. 207.

798 GC IV, Art. 27(2); AP I, Art. 76(1); CIHL, Rules 93 and 134.

799 AP I, Art. 76(2).

800 AP I, Art. 76(3).

801 All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

- “[Women](#),” *IRRC*, Vol. 92, No. 877, March 2010.
- Charlotte Lindsey, “[Women and war: An overview](#),” *IRRC*, No. 839, September 2000, pp. 561–580.
- ICRC Advisory Services, *Prevention and Criminal Repression of Rape and other Forms of Sexual Violence during Armed Conflicts*, Legal factsheet, ICRC, March 2015. Available at: <https://www.icrc.org/en/download/file/4865/prevention-criminal-repression-rape-sexual-violence-armed-conflicts-icrc-eng.pdf>
- “Women,” webpage, ICRC. Available at: <https://www.icrc.org/en/war-and-law/protected-persons/women>
- “Sexual violence in armed conflicts: Questions and answers,” ICRC, November 2013. Available at: <https://www.icrc.org/en/document/sexual-violence-armed-conflict-questions-and-answers>

### ***How Does Law Protect in War?***

- Case No. 270, [India, Press Release, Violence in Kashmir](#)

### **(b) Children**

#### ***Duty to provide protection and care***

Children are probably the most vulnerable group in any population affected by armed conflict. Orphaned or otherwise left to their own resources, they often have no choice but to seek safety, food and shelter with organized armed groups or criminal gangs, where they become victims of forced recruitment, slavery and sexual violence. Therefore, belligerent parties must also ensure that children under the age of 15 are not left to their own resources,<sup>802</sup> and that all children under 12 are equipped with identity discs or similar means of identification.<sup>803</sup> In particular, the parties to a conflict must provide children with the care and assistance they require, facilitate their education and religious practice,<sup>804</sup> and protect them against any form of indecent assault.<sup>805</sup>

#### ***Recruitment***

Children who are recruited into armed forces or armed groups are particularly exposed to violence and other dangers of war. As combatants or as civilians directly participating in hostilities, they may even become

802 GC IV, Art. 24(1); CIHL, Rule 135.

803 GC IV, Art. 24(3).

804 GC IV, Art. 24(1); AP I, Art. 77(1); CIHL, Rules 104 and 135.

805 AP I, Art. 77(1); CIHL, Rule 93.



T.A. Voeten/ICRC

Ganta, Liberia, on the border with Guinea, 2003. Female members of government armed forces/militias on guard duty.

legitimate military targets themselves. Belligerent parties must therefore take all feasible measures to prevent children under the age of 15 from directly participating in hostilities and, in particular, may not recruit them into their armed forces.<sup>806</sup> While recruiting among people who are 15 or older but have not yet reached the age of 18, the parties to a conflict must endeavour to give priority to those who are oldest.<sup>807</sup> While the 1989 Convention on the Rights of the Child initially adopted the same obligations,<sup>808</sup> its Optional Protocol of May 2000 lifted the age limit for compulsory recruitment to 18 years, called on States to raise the minimum age for voluntary recruitment above 15 years and provided that non-State armed groups should not under any circumstances recruit or use in hostilities children under 18 years of age.<sup>809</sup> If children fall into the power of an adverse party after having directly participated in hostilities, they continue to benefit from the special protection accorded to children, whether or not they are prisoners of war.<sup>810</sup>

### **Evacuation**

Belligerent parties should facilitate the accommodation of unaccompanied children under the age of 15 in a neutral country for the duration of a

806 AP I, Art. 77(2); CIHL, Rules 136 and 137.

807 AP I, Art. 77(2).

808 Convention on the Rights of the Child, 20 November 1989, Art. 38(3).

809 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000, Arts 2–4.

810 AP I, Art. 77(3).

conflict.<sup>811</sup> However, they may not evacuate children who are not their own nationals to a foreign country, except on a temporary basis where required for the health, medical treatment or safety of the children. In occupied territory, such evacuation must be consistent with Article 49 of the Fourth Geneva Convention. Any such evacuation must be conducted with the consent of the parents or guardian or other responsible person, unless such responsible persons cannot be found, and in any case under the supervision of the Protecting Power and with the agreement of the evacuating State, the receiving State and the child's State of nationality.<sup>812</sup> To facilitate the return of evacuated children to their families, the authorities concerned must provide the ICRC's Central Tracing Agency with relevant information for each child.<sup>813</sup>

### To go further (Children)<sup>814</sup>

- *Democratic Republic of the Congo: Children of Conflict Return Home*, film, ICRC, 2013. Available at: [https://www.youtube.com/watch?v=KzU250Pb\\_A](https://www.youtube.com/watch?v=KzU250Pb_A)
- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, [Chapter 8: The Protection of Civilians](#), pp. 217–220.
- Daniel Helle, “[Optional Protocol on the involvement of children in armed conflict to the Convention on the Rights of the Child](#),” *IRRC*, No. 839, September 2000.
- ICRC, *Children Associated with Armed Forces or Armed Groups*, ICRC, Geneva, September 2013, 14 pp.
- “Children,” webpage, ICRC. Available at: <https://www.icrc.org/en/war-and-law/protected-persons/children>

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- Case No. 237, [ICC, \*The Prosecutor v. Thomas Lubanga Dyilo\*](#)
- Case No. 276, [Sierra Leone, \*Special Court Ruling on the Recruitment of Children\*](#)

811 GC IV, Art. 24(1) and (2).

812 AP I, Art. 78(1).

813 For a complete list of the information to be recorded, see AP I, Art. 78(3).

814 All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

### (c) Journalists and war correspondents

Journalists working in areas of armed conflict are inevitably exposed to the incidental dangers of warfare. The greatest risk they incur because of their specific role is that of being detained for alleged espionage, or of being deliberately attacked by forces, groups or individuals opposed to independent media reports from the area in question. In recent years, demands have been made for journalists reporting from conflict zones to be given a separate status or protective emblem in order to enhance their protection during armed conflict. In reality, however, journalists face dangers in conflict areas, not for want of legal protection, but because of a lack of respect for the protection already afforded to them under IHL. Additional Protocol I expressly affirms that “journalists engaged in dangerous professional missions in areas of armed conflict” qualify as civilians under IHL,<sup>815</sup> and requires that they be protected as such, provided they do not “take action adversely affecting their status as civilians.”<sup>816</sup> The only action for which civilians can be deprived of protection against direct attacks is direct participation in hostilities.<sup>817</sup> If journalists are formally accredited to the armed forces, whether as “war correspondents” or, less technically, as “embedded journalists,” they remain civilians, but are entitled to prisoner-of-war status upon capture.<sup>818</sup> IHL does not provide journalists with a right of access to conflict-affected areas or persons but, in principle, grants them the same rights and subjects them to the same restrictions as ordinary civilians. It is thus entirely up to belligerent parties to decide whether they want to grant journalists privileges or, within the bounds of IHL, whether they want to impose more severe restrictions on them than are applied to the general civilian population. Additional Protocol I nevertheless recommends that the State of nationality or residence, or that State in which the media organization employing them has its headquarters, issue identity cards to journalists on dangerous professional missions.<sup>819</sup> Given that journalists are simply civilians, such cards do not confer any particular status, rights or privileges under IHL but, in practice, may help to protect journalists from wrongful accusations of espionage or other hostile activities.

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815 AP I, Art. 79(1).

816 AP I, Art. 79(2); CIHL, Rule 34.

817 CIHL, Rule 34. See also Chapter 3.I.4.

818 GC III, Art. 4(A)(4).

819 AP I, Art. 79(3). Annex II to AP I provides a model identity card for that purpose.





D. Revol/ICRC

Syrian refugees at the assembly point in Bustana, Syrian Arab Republic, before crossing into Jordan and the refugee camp at Ruwashed, 2013.

#### (d) Refugees, the stateless and the internally displaced

Refugees<sup>820</sup> and stateless persons<sup>821</sup> caught up in an armed conflict may find themselves in a very difficult situation. They are not nationals of the territorial State, nor can they rely on the protection of their State of origin or State of last residence. It is therefore important not to exclude them from the protection of IHL, or otherwise place them at a disadvantage, based on formalistic criteria of nationality that do not correspond to the reality of their situation.

Thus, the Fourth Geneva Convention provides that belligerent parties should not consider persons as enemy nationals merely because they are nationals *de jure* of an opposing party to a conflict when, as refugees fleeing persecution, they cannot *de facto* rely on the protection of their State of nationality.<sup>822</sup> Additional Protocol I provides that persons who, before the beginning of hostilities, were recognized as stateless or refugees under international law, or under the national law of the State of refuge or residence, must be treated as protected persons within the meaning of the Fourth Geneva Convention in all circumstances and

820 According to Article 1(A)(2) of the 1951 Convention relating to the Status of Refugees, the term refugee describes “any person who (...) owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country...”

821 According to Article 1 of the 1954 Convention relating to the Status of Stateless Persons, “the term ‘stateless person’ means a person who is not considered as a national by any State under the operation of its law.”

822 GC IV, Art. 44.



B. Heger/ICRC

Ouham region, Bossonga, Central African Republic, 2013. A group of displaced persons fleeing violence reach the outskirts of the town, where they will seek refuge at the Catholic mission.

without any adverse distinction.<sup>823</sup> Most notably, should such persons fall into the power of an adverse party to the conflict, they may not be denied the protection of the Fourth Geneva Convention even if they are nationals of the detaining power.<sup>824</sup>

Internally displaced persons are “persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.”<sup>825</sup> Although internal displacement is a major cause of humanitarian crisis in many armed conflicts, treaty IHL does not specifically address the issue, but simply affords displaced persons the same general protection as the civilian population. Furthermore, as long as they remain within the territory of their State of origin, displaced persons cannot benefit from refugee status and the attached rights under the 1951 Convention relating to the Status of Refugees. In order to address this gap in the law, the UN Human Rights Commission adopted a soft-law instrument, the Guiding Principles on Internal Displacement, in 1998. These principles provide non-binding guid-

823 AP I, Art. 73.

824 See also GC IV, Art. 70(2), on the protection of refugees in occupied territory who are the occupying power’s own nationals.

825 *United Nations Guiding Principles on Internal Displacement*, document E/CN.4/1998/53/Add.2, 1998 (Deng Principles), Art. 2.

ance to States and other authorities or organizations confronted with internal displacement. They also identify rights and guarantees aiming to protect persons from forced displacement, and to protect and assist them both during such displacement and during their return or resettlement and reintegration.<sup>826</sup> It was only in 2009, with the adoption of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention), that legal protection of internally displaced persons was regulated in a specific international treaty.<sup>827</sup>

### To go further (Journalists, the displaced and refugees)<sup>828</sup>

- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, [Chapter 8: The protection of civilians](#), pp. 220, 226–230 and 237.
- “[Displacement](#),” *IRRC*, Vol. 91, No. 875, September 2009.
- “Refugees and Displaced Persons,” webpage, ICRC. Available at: <https://www.icrc.org/en/war-and-law/protected-persons/refugees-displaced-persons>

### *How Does Law Protect in War?*

- Case No. 37, [Protection of Journalists](#)
- Case No. 196, [Sri Lanka, Conflict in the Vanni](#)
- Case No. 228, [Case Study, Armed Conflicts in the Great Lakes Region \(1994–2005\)](#)
- Case No. 274, [Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea \(1980–2005\)](#)

## II. ENEMY NATIONALS IN THE TERRITORY OF A BELLIGERENT PARTY

### 1. Protected persons as “enemy nationals”

At the outbreak of war, nationals of one belligerent party who are resident or otherwise present within the territory of an opposing party may find themselves in a very difficult situation. They may have left their country of origin decades earlier to build a new life in another country and, because

<sup>826</sup> United Nations Guiding Principles, *op. cit.* (note 825), Arts 1 and 3.

<sup>827</sup> The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) was adopted on 23 October 2009 and entered into force on 6 December 2012; by the end of 2014, it had been signed by 39 and ratified by 22 member States of the African Union.

<sup>828</sup> All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

of the war, may suddenly be considered “enemy nationals” by their country of residence. One well-known example of this is the approximately 30,000 Japanese nationals in the United States who were collectively interned for the duration of World War II, along with around 80,000 US citizens of Japanese descent. In order to avoid the severe humanitarian impact of such generalized security measures, the Fourth Geneva Convention establishes a regime of protection for persons present in the territory of a belligerent party who are of enemy nationality, or whose State of origin does not maintain normal diplomatic relations with the territorial State.

## 2. Right to leave and transfers to another country

### *Right to leave*

The most important right granted to protected persons is the right to leave the territory of a belligerent party, whether immediately, when conflict breaks out, or later, while it is being fought. The territorial State may refuse a protected person’s departure if that would be contrary to its “national interests,”<sup>829</sup> a criterion that seems to be broader than considerations of “State security.” In fact, based on the argument of national interest, the territorial State could legitimately refuse or restrict the repatriation, for example, of male enemy nationals of fighting age, of scientists or other experts who could make an effective contribution to the enemy’s war effort, or arguably even of persons whose continued presence is needed by the territorial State for economic reasons.<sup>830</sup> Nevertheless, in view of the potential humanitarian consequences of the excessive use of restrictive measures, belligerent parties should use their right to refuse the departure of protected persons with utmost restraint. In any case, the applications of such persons to leave must be decided as rapidly as possible and in accordance with regularly established procedures, which must include the right to appeal an initial refusal or reconsideration by an appropriate court or administrative board.<sup>831</sup> Permitted departures must be carried out in satisfactory conditions in terms of safety, hygiene, sanitation and food, and those who are granted permission to leave must be able to take with them the funds needed for their journey and “a reasonable amount of their effects and articles of personal use.”<sup>832</sup> While this would seem to allow protected persons to take with them as much of their property as they can personally carry, the national control measures usually enacted at the outset of a conflict are likely to prohibit the export of larger amounts of capital or movable property.<sup>833</sup>

829 GC IV, Art. 35(1).

830 J.S. Pictet (ed.), *Commentary on the Fourth Geneva Convention*, op. cit. (note 387), p. 236.

831 GC IV, Art. 35(1).

832 GC IV, Arts 35(1) and 36(1).

833 J.S. Pictet (ed.), *Commentary on the Fourth Geneva Convention*, op. cit. (note 387), p. 236.

### *Transfers to another country*

In principle, a belligerent party may lawfully transfer protected persons present within its territory to that of another State party to the Fourth Geneva Convention and willing and able to provide them with the protection they are entitled to under IHL. In line with the customary principle of *non-refoulement*, however, protected persons may in no circumstances be transferred to a country where they may have reason to fear persecution for their political opinions or religious beliefs.<sup>834</sup> This prohibition constitutes no obstacle to the repatriation or return of protected persons after the cessation of hostilities,<sup>835</sup> or to their extradition in relation to offences against ordinary criminal law and based on extradition treaties pre-dating the conflict.<sup>836</sup> Just as is the case for persons deprived of their liberty, responsibility for the protection of persons lawfully transferred to another State passes to the receiving State for such time as they remain in its custody. Here, too, if the receiving State fails to fulfil its obligations under IHL in any important respect, the transferring State must take effective measures to correct the situation or ensure that the protected persons in question are returned to its jurisdiction.<sup>837</sup>

## 3. Non-repatriated persons

### *Treatment*

Non-repatriated persons who remain within the territory of an adverse party to a conflict are protected persons under the Fourth Geneva Convention and benefit from the full protection of IHL. In principle, with a few exceptions, their situation should continue to be regulated by the law applicable to foreign nationals in time of peace. In any case, the territorial State must ensure that protected persons are authorized to move from areas particularly exposed to the dangers of war to the same extent as the local population, and that they are given the same treatment in terms of health care, social assistance and the opportunity to find paid employment so as to be able to support themselves. Protected persons must also be allowed to practise their religion, to benefit from spiritual assistance and to receive individual or collective relief or allowances sent to them by their next of kin, their country of origin, the Protecting Power, or relief societies.<sup>838</sup> Where measures of security and control imposed by the territorial State prevent protected persons from finding paid employment or from otherwise supporting themselves, that State must provide such protected persons and their dependents with the necessary support.<sup>839</sup> Pro-

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834 GC IV, Art. 45(3).

835 GC IV, Art. 45(2).

836 GC IV, Art. 45(5).

837 GC IV, Art. 45(3).

838 GC IV, Arts 38 and 39(3).

839 GC IV, Art. 39(2).

ected persons may be compelled to work only to the same extent as nationals of the territorial State, and must benefit from the same working conditions and safeguards concerning pay, working hours, clothing and equipment, training and compensation for accidents and illness.<sup>840</sup> However, protected persons of enemy nationality may not be compelled to do work directly related to the conduct of military operations.<sup>841</sup>

### *Security measures*

Within the limits set by IHL, the territorial State may subject protected persons to any measures of control and security it may deem necessary “as a result of the war.”<sup>842</sup> The general principles governing security measures with regard to persons protected by the Fourth Geneva Convention apply here as well. This means that the territorial State enjoys a great deal of latitude in determining the kind, severity and duration of the security measures to be imposed, provided that the fundamental guarantees afforded by IHL are upheld at all times and provided also that no security measure is more severe than assigned residence or internment.<sup>843</sup> Restrictive measures taken regarding protected persons and their property must be cancelled as soon as possible after the end of hostilities.<sup>844</sup>

### **To go further (Enemy nationals in the territory of a belligerent party)<sup>845</sup>**

- Marco Sassòli, “The concept of security in international law relating to armed conflicts,” in Cecilia M. Bailliet (ed.), *Security: A Multidisciplinary Normative Approach*, Martinus Nijhoff, Leiden/Boston, 2009, pp. 7–23.

### ***How Does Law Protect in War?***

- Case No. 162, [Eritrea/Ethiopia, Award on Civilian Internees and Civilian Property](#)
- Case No. 175, [UN, Detention of Foreigners](#)
- Case No. 216, [ICTY, The Prosecutor v. Blaskić](#)

840 GC IV, Art. 40(1) and (3).

841 GC IV, Art. 40(2).

842 GC IV, Art. 27(4).

843 GC IV, Art. 41(1).

844 GC IV, Art. 46.

845 All ICRC documents available at: [www.icrc.org](http://www.icrc.org)





G. Kavalerchik/ICRC

Kuneitra checkpoint, Israeli-occupied Golan, 2013. Families bid a tearful farewell to students returning to their studies at Damascus University.

### III. INHABITANTS OF OCCUPIED TERRITORIES

In situations of belligerent occupation, a belligerent State exercises military authority over all or part of the territory of an opposing party to the conflict.<sup>846</sup> This position of almost absolute power over the territory, infrastructure and population of an enemy State has in the past led to the most shocking abuse. It is sufficient to remember the policies of deportation, enslavement and extermination, and the looting, rape and abuse committed by occupying powers in the context of World War II, to understand the desperate need for protection of the populations concerned. Apart from exposing the population to direct abuse by a hostile power, belligerent occupation can also have complex legal and political implications beyond the realm of IHL. In particular, contexts of long-term occupation without any realistic prospect of political resolution, or contexts of “transformative” occupation intended to change the local political system, can profoundly destabilize entire societies and result in widespread and persistent human suffering. The modern law of occupation, as reflected in the Hague Regulations, the Fourth Geneva Convention and Additional Protocol I, does not question the lawfulness of belligerent occupation, but recognizes the *de facto* authority of the occupying power and takes its legitimate security interests into account. At the same time, it aims to prevent the introduction of unwarranted changes to the intrinsic characteristics of the occupied territory, to protect

<sup>846</sup> See Chapter 2.IV.

the inhabitants from arbitrary decisions and abuse, and to allow them to lead as normal a life as possible.

## 1. The occupying power as a temporary *de facto* authority

### (a) Responsibility for public order and safety

The Hague Regulations describe the basic role and responsibilities of an occupying power as follows: “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”<sup>847</sup> Thus, for the duration of the occupation, the occupying power *de facto* replaces the legitimate government (but without devolution of sovereignty) and has a legal right and duty to ensure public order and safety in accordance with the laws already in force in the territory. Significant restrictions to the occupying power’s authority, compared to that of the legitimate sovereign, prohibit the introduction of permanent changes to the social, demographic, geographical, political and economic structure of the occupied territory, the exploitation for profit of its natural, cultural and economic resources, and any other exercise of its authority that is in contradiction with its duties towards the occupied territory and its inhabitants. In particular, as has been pointed out, the occupying power may not impose any security measures more severe than assigned residence or internment on protected persons under its control.<sup>848</sup> In sum, the law of occupation could be described as a legal regime tailor-made for the temporary administration of territories belonging to a hostile State. Any permanent changes introduced into the legal and political order of an occupied territory must be based on a valid peace treaty or, exceptionally, on a resolution adopted by the UN Security Council in line with its responsibility for maintaining or restoring international peace and security.

### (b) Responsibility for public administration and services

Apart from ensuring public order and safety, the occupying power also bears ultimate responsibility for the continued functioning of public institutions and services for the benefit of the population under occupation. The occupying power must, to the fullest extent of the means available to it, ensure that the civilian population has the basic items needed for its survival, such

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847 Hague Regulations, Art. 43. Experts generally agree that this provision, as reflected in the French text, imposes on the occupying power an obligation “to restore public order and civil life,” the meaning of which is much broader than the term “public safety” used in the English version. See ICRC, *Occupation and Other Forms of Administration*, *op. cit.* (note 80), pp. 56–57.

848 See Chapter 5.III.



as food, medical supplies, clothing and shelter.<sup>849</sup> Likewise, with the co-operation of the national and local authorities, it must ensure and maintain medical services, public health and hygiene,<sup>850</sup> facilitate adequate education and care for children,<sup>851</sup> and permit the provision of spiritual assistance<sup>852</sup> and humanitarian relief<sup>853</sup> within the occupied territory. The occupying power can also collect the taxes, dues and tolls imposed by local legislation on behalf of the occupied State, but must use such revenue for the administration and benefit of the occupied territory.<sup>854</sup>

### (c) Respect for public officials and judges

In principle, public officials and judges in the occupied territory must be allowed to retain their status and to continue to carry out their duties in the service of the inhabitants without unwarranted interference or intimidation.<sup>855</sup> For example, the Fourth Geneva Convention provides that, as long as they pose no obstacle to the effective administration of justice or to the occupying power's full compliance with IHL, the criminal tribunals of the occupied territory should continue to adjudicate all offences by protected persons under local legislation.<sup>856</sup> Should public officials and judges abstain from fulfilling their functions for reasons of conscience, however, they may not be exposed to sanctions or to measures of coercion or discrimination.<sup>857</sup> This principle is subject to two exceptions. First, the occupying power retains its right to requisition compulsory labour from public officials and judges whose work is "necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country."<sup>858</sup> Second, the occupying power may come to the conclusion that the effective implementation of its duties under IHL requires the removal of public officials from their posts and the establishment of its own administration and courts.<sup>859</sup> In reality, however, occupying authorities tend to remove only government officials and other political agents, and to continue to rely on local officials for the non-political administration of the occupied territory.<sup>860</sup>

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849 GC IV, Art. 55; AP I, Art. 69(1).

850 GC IV, Art. 56(1); AP I, Art. 14(1).

851 GC IV, Art. 50.

852 GC IV, Art. 58.

853 GC IV, Arts 59–63; CIHL, Rule 55.

854 Hague Regulations, Art. 48.

855 J.S. Pictet (ed.), *Commentary on the Fourth Geneva Convention, op. cit.* (note 387), p. 304.

856 GC IV, Art. 64(1).

857 GC IV, Art. 54(1).

858 GC IV, Arts 51(2) and 54(2).

859 GC IV, Art. 54(2).

860 J.S. Pictet (ed.), *Commentary on the Fourth Geneva Convention, op. cit.* (note 387), p. 308.

## 2. Protection of the inhabitants

The provisions of IHL specifically designed to govern situations of belligerent occupation can be found primarily in the Hague Regulations<sup>861</sup> and the Fourth Geneva Convention,<sup>862</sup> supplemented by individual provisions from Additional Protocol I.<sup>863</sup> While the Hague Regulations protect the population of the occupied territory as a whole,<sup>864</sup> the Fourth Geneva Convention is based on the concept of “protected person,” which includes all persons present in occupied territories except: (a) the nationals of the occupying power and its co-belligerents, and (b) those entitled to prisoner-of-war status.<sup>865</sup> Also protected are persons formally recognized as refugees, regardless of their nationality.<sup>866</sup> While the respective scopes of protection are not identical for those different categories of person, developments in customary IHL and human rights law since World War II have rendered the differences largely irrelevant in practice.

### (a) Humane treatment

More than a hundred years ago, the Hague Regulations were already requiring that, in occupied territory, the lives and property of the inhabitants, their family honour and rights, and their religious convictions and practice be respected,<sup>867</sup> and prohibited the infliction of collective punishment “upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.”<sup>868</sup> Today, the general obligation of humane treatment and non-discrimination expressed in the Fourth Geneva Convention and Additional Protocol I also applies to the population of occupied territories,<sup>869</sup> as do the specific duties, prohibitions and guarantees derived from that obligation.<sup>870</sup> Therefore, modern IHL governing belligerent occupation does not contain a separate reaffirmation of these fundamental guarantees but focuses on additional topics relevant to the specific circumstances of occupied territories, such as the inviolability of the rights and allegiance of the inhabitants, the prohibition of demographic changes, and the protection of private and public property and of the legal order in territories subject to belligerent occupation.

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861 Hague Regulations, Arts 42–56.

862 GC IV, Arts 47–78.

863 AP I, Arts 44(3), 63, 69, 73 and 85(4)(a).

864 The relevant provisions of the Hague Regulations refer to “inhabitants” (Arts 44, 45 and 52), the “population” (Art. 50) and “persons” (Art. 46).

865 GC IV, Art. 4.

866 AP I, Art. 73.

867 Hague Regulations, Art. 46(1).

868 Hague Regulations, Art. 50.

869 GC IV, Art. 27(1) and (3); AP I, Art. 75(1); CIHL, Rules 87 and 88.

870 GC IV, Arts 27–34; AP I, Arts 72–79.

## (b) Rights, duties and allegiance of the population

### *Inviolability and non-renunciation of rights*

In situations of occupation, particular importance is given to protecting the population from attempts by the occupying power to abuse its position of strength and introduce changes to the political status, structure and institutions of the occupied territory, whether through unilateral acts or on the basis of forced bilateral agreements with the occupied State. The Fourth Geneva Convention therefore emphasizes that no agreement concluded between belligerent parties, annexation or other change to the institutions or government of an occupied territory may deprive the inhabitants of the benefits of the Convention.<sup>871</sup> Nor may protected persons renounce all or part of the rights afforded to them under the Fourth Geneva Convention or under any special agreements between the belligerent parties.<sup>872</sup>

### *Duty of obedience and respect for allegiance*

Also, while the inhabitants of occupied territory have a duty of obedience towards the *de facto* authorities of the occupying power, they have no corresponding duty of allegiance. Thus, they cannot be compelled to swear allegiance to the occupying power,<sup>873</sup> to serve in its armed or auxiliary forces,<sup>874</sup> or to furnish information about the armed forces or means of defence of the occupied State.<sup>875</sup> Nor may the occupying power use pressure or propaganda aimed at securing voluntary enlistment in the occupying forces,<sup>876</sup> or deliberately restrict employment opportunities in an occupied territory so as to induce the inhabitants to work in its service.<sup>877</sup> For the same reason, protected persons may not be compelled to undertake any work that would oblige them to participate personally in military operations against their own country or to use force to ensure the security of installations where compulsory labour is performed, or that would involve them in an organization of a military or semi-military character.<sup>878</sup> More generally, the requisition of services (compulsory work) must be ordered by the commander of the occupied locality,<sup>879</sup> and is permitted only for protected persons over 18 years of age and only to the extent necessary: (a) for the needs of the army of occupation, or (b) for the public utility services, or (c) for the feeding, shel-

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871 GC IV, Art. 47.

872 GC IV, Art. 8

873 Hague Regulations, Art. 45.

874 GC IV, Art. 51(1).

875 Hague Regulations, Art. 44.

876 GC IV, Art. 51(1).

877 GC IV, Art. 52(2).

878 GC IV, Art. 51(2) and (4); Hague Regulations, Art. 52(1).

879 Hague Regulations, Art. 52(2).

tering, clothing, transportation or health of the population of the occupied country.<sup>880</sup> In all such cases, requisitioned work must be carried out within the occupied territory and must correspond to each individual's physical and intellectual capacities. Workers must be paid a fair salary and must benefit from the legislation in force in the occupied country concerning working conditions and, in particular, the safeguards concerning wages, working hours, equipment, preliminary training and compensation for occupational accidents and diseases.<sup>881</sup>

### (c) Prohibition of transfers, deportation and colonization

#### *Prohibition of transfers and deportations*

Another danger in situations of occupation is that the occupying power will introduce demographic changes in furtherance of its territorial or political ambitions, most notably through deportations from and population transfers within occupied territories. In view of the enormous suffering caused by the deportation of millions of civilians during World War II, the Fourth Geneva Convention and customary IHL now absolutely prohibit both individual and mass forcible transfers within occupied territory and deportations of protected persons (including those deprived of their liberty) from occupied territory, regardless of their motive and destination.<sup>882</sup>

#### *Exception for temporary evacuations*

Nevertheless, the Fourth Geneva Convention recognizes that the security of the population or imperative military considerations may require the total or partial evacuation of an area and may even render inevitable the temporary transfer of protected persons outside the occupied territory. In such exceptional circumstances, the Protecting Power must be informed as soon as the evacuation or transfer has taken place,<sup>883</sup> and all persons concerned must be returned to their area of departure as soon as hostilities there have ceased.<sup>884</sup> During any such transfer, protected persons must be treated humanely and provided with the necessary food, water, clothing and medical care. Moreover, suitable precautions must be taken to ensure their safety and to prevent their separation from relatives.<sup>885</sup>

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880 GC IV, Art. 51(2).

881 GC IV, Art. 51(3); CIHL, Rule 95.

882 GC IV, Art. 49(1); CIHL, Rules 129 and 130.

883 GC IV, Art. 49(4).

884 GC IV, Art. 49(2); CIHL, Rule 132.

885 GC IV, Art. 49(3); CIHL, Rules 105 and 131.

### ***Exception for voluntary displacement and departures***

The aim of this prohibition is not, however, to prevent protected persons from voluntarily moving within occupied territory or from leaving it altogether. This is important because protected persons may of their own accord want to seek refuge from the dangers of military operations in other areas within the occupied territory. Also, foreign nationals may wish to be repatriated, and nationals of the occupied country may have been exposed to ethnic or political discrimination or persecution prior to the occupation or may have other legitimate reasons for leaving the territory.<sup>886</sup> The Fourth Geneva Convention therefore does not prohibit voluntary departures from occupied territory by protected persons of any nationality; it even provides those who are not nationals of the occupied State with an express right to leave comparable to protected persons in a belligerent party's own territory.<sup>887</sup> The Convention also provides that, unless required for the security of the population or for imperative military reasons, the occupying power may not retain protected persons in areas of the occupied territory that are particularly exposed to the dangers of war.<sup>888</sup> In fact, the belligerent parties must endeavour to evacuate besieged and encircled areas<sup>889</sup> and to shelter parts of the population in safety zones<sup>890</sup> or neutralized zones<sup>891</sup> away from their usual place of residence.

### ***Prohibition of colonization***

IHL also absolutely prohibits the deportation or transfer of parts of the occupying power's own civilian population into the occupied territory.<sup>892</sup> This prohibition is intended to prevent the colonization of occupied territories by nationals of the occupying power, and the gradual establishment of "facts on the ground" that may eventually result in a *de facto* annexation of the territory in question. A well-known case in point is the longstanding Israeli policy of establishing settlements for parts of its own population inside the occupied Palestinian territory. The ICRC has consistently taken the position that this policy is in clear violation of IHL and has had grave humanitarian consequences for decades.<sup>893</sup>

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886 J.S. Pictet (ed.), *Commentary on the Fourth Geneva Convention, op. cit.* (note 387), p. 279.

887 GC IV, Art. 48.

888 GC IV, Art. 49(5).

889 GC IV, Art. 17.

890 GC IV, Art. 14.

891 GC IV, Art. 15.

892 GC IV, Art. 49(6); CIHL, Rule 130.

893 Peter Maurer, "[Challenges to international humanitarian law: Israel's occupation policy](#)," *IRRC*, Vol. 94, No. 888, Winter 2012, pp. 1503–1510.

### 3. Protection of property

#### (a) General prohibition of pillage and destruction of property

As a general rule, when a territory is occupied, its entire infrastructure, its population, and the private property of its inhabitants fall into the hands of a hostile army. Throughout the history of warfare, arbitrary acts of revenge, pillage and destruction by marauding armies have caused enormous suffering among the civilian population, needlessly aggravated the damage caused by the war and placed obstacles in the way of recovery, reconstruction and eventual reconciliation. IHL therefore unequivocally prohibits the pillage of any type of property, whether it belongs to private persons, to communities or to the State.<sup>894</sup> It also prohibits the destruction by the occupying power of any movable or immovable property, whether private or public, “except where such destruction is rendered absolutely necessary by military operations.”<sup>895</sup> According to the ICRC, the expression “military operations” in this provision refers to “the movements, manoeuvres and other action taken by the armed forces with a view to fighting.”<sup>896</sup> As a consequence, the destruction of property is permissible only to the extent absolutely required for the conduct of hostilities, and cannot be ordered on merely punitive, deterrent or administrative grounds. In any case, neither prohibition affects the occupying power’s right to requisition or seize public and, in exceptional cases, private property.

#### (b) Protection of public property

In line with its role as a temporary *de facto* authority, the occupying power is regarded as simply the administrator and usufructuary of the immovable property belonging to the occupied State, including public buildings, real estate, forests and agricultural estates situated in the occupied territory. This means that the occupying power must safeguard the capital of these properties and administer them in accordance with the rules of usufruct.<sup>897</sup> Civilian hospitals may be requisitioned only temporarily and only in cases of urgent necessity for the care of wounded and sick military personnel. In each such case, suitable arrangements must first be made for the accommodation and care of the hospital’s civilian patients and for meeting needs in the civilian population for hospital accommodation.<sup>898</sup> The material and stores of civilian hospitals, however, cannot be requisitioned as long as they are

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894 Hague Regulations, Arts 28 and 47; GC IV, Art. 33(2); CIHL, Rule 52. See also J.S. Pictet (ed.), *Commentary on the Fourth Geneva Convention, op. cit.* (note 387), pp. 226–227.

895 Hague Regulations, Art. 23(g); GC IV, Art. 53. See also Hague Regulations, Art. 54, with regard to submarine cables.

896 ICRC, “Interpretation by the ICRC of Article 53 of the Fourth Geneva Convention of 12 August 1949, with particular reference to the expression ‘military operations,’” official statement, 25 November 1981.

897 Hague Regulations, Art. 55; CIHL, Rule 51(a) and (b).

898 GC IV, Art. 57(1).

needed by the civilian population.<sup>899</sup> With regard to movable property of the occupied State, the occupying power's right to confiscate is limited to cash, equivalent funds and realizable securities, and to movable property that can be used for military operations, such as arms depots, means of transportation, stores and supplies.<sup>900</sup> The property of municipalities and of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, must be treated as private property. All seizure or destruction of, or wilful damage done to such institutions, to historic monuments, or to works of art and science, is prohibited.<sup>901</sup>

### **(c) Protection of private property**

In principle, the confiscation of private property by the occupying power is prohibited.<sup>902</sup> However, this prohibition is subject to two important exceptions that significantly restrict the protection of private property. First, private property that may be used for military operations (such as communication devices, means of transportation and weaponry) may be seized, but must be restored or its owner compensated at the end of the conflict.<sup>903</sup> Second, the occupying power may lawfully requisition other goods or money from the inhabitants.<sup>904</sup> Both types of requisition involve the unilateral expropriation of the inhabitants and must be carried out in accordance with certain rules. First, requisitions may not be carried out for purposes other than covering the needs of the occupation army (including those related to its security) or of the administration of the occupied territory and must always be in proportion to the resources of the occupied country.<sup>905</sup> In no case may money, goods or services be requisitioned for the needs or benefit of the occupying power's domestic government, administration or population. To avoid abuse, goods may be requisitioned and money collected only after an express order from the commander-in-chief in the occupied territory,<sup>906</sup> and only against delivery of a formal receipt for all funds and goods received.<sup>907</sup> The collection of money should be carried out in accordance with the rules of assessment and incidence of the taxes collected on behalf of the occupied State.<sup>908</sup> When the occupying power requisitions goods, such as foodstuffs

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899 GC IV, Art. 57(2).

900 Hague Regulations, Art. 53(1).

901 Hague Regulations, Art. 56; CIHL, Rule 40 A.

902 Hague Regulations, Art. 46(2); CIHL, Rule 51(c).

903 Hague Regulations, Art. 53(2); CIHL, Rule 49.

904 Hague Regulations, Art. 52(1).

905 Hague Regulations, Art. 49; GC IV, Art. 55(2).

906 Hague Regulations, Arts 51(1) and 52(2).

907 Hague Regulations, Arts 51(3) and 52(3).

908 Hague Regulations, Art. 51(2).

or medical supplies, the needs of the civilian population must be taken into account, and fair value must be paid for any goods received.<sup>909</sup>

#### (d) Protection of cultural property

The general duty of belligerent parties to safeguard and respect cultural property also applies in occupied territory.<sup>910</sup> Thus, besides the duties of both the occupying and the occupied State with regard to the protection of cultural property during the conduct of hostilities,<sup>911</sup> the occupying power may not requisition cultural property situated in the occupied territory and must protect it from any form of vandalism, theft, pillage or misappropriation.<sup>912</sup> In particular, the occupying power must prohibit and prevent: (a) any illicit export, other removal or transfer of ownership of cultural property; (b) any archaeological excavation not strictly required to safeguard, record or preserve cultural property; and (c) any alteration to, or change of use of, cultural property intended to conceal or destroy cultural, historical or scientific evidence.<sup>913</sup> The occupying authorities must also provide the competent national authorities of the occupied State with all necessary and feasible support for safeguarding and preserving its cultural property.<sup>914</sup> Wherever possible, permissible excavations, alterations, or changes to the use of cultural property in occupied territory must be carried out in close cooperation with the competent national authorities of the territory.<sup>915</sup>

### 4. Protection of legal order

#### (a) Duty to respect local legislation “unless absolutely prevented”

The Hague Regulations require that the occupying power, in exercising its *de facto* authority, respect the laws in force in the occupied territory “unless absolutely prevented.”<sup>916</sup> The Fourth Geneva Convention contains a number of provisions on penal legislation that are accepted as authoritatively interpreting this reservation as applying to the legal system of the occupied territory as a whole, i.e. including not only penal law, but also civil, constitutional and administrative law.<sup>917</sup> Accordingly, the occupying power may repeal or suspend local laws only in two cases, namely where they constitute a threat to its security or an obstacle to the application of IHL. For example, an occupying power

909 GC IV, Art. 55(2).

910 Hague Convention on Cultural Property, Art. 18(2); Second Protocol to the Hague Convention on Cultural Property, Art. 3(1); CIHL, Rule 38.

911 See Chapter 3.II.2.a.

912 Hague Convention on Cultural Property, Art. 4(3).

913 Second Protocol to the Hague Convention on Cultural Property, Art. 9(1).

914 Hague Convention on Cultural Property, Art. 5(1) and (2).

915 Second Protocol to the Hague Convention on Cultural Property, Art. 9(2).

916 Hague Regulations, Art. 43.

917 J.S. Pictet (ed.), *Commentary on the Fourth Geneva Convention*, *op. cit.* (note 387), p. 335.



could lawfully abrogate a local law obliging the population to engage in armed resistance, or local legislation imposing a regime of racial discrimination contrary to the principles of humane treatment and of non-discrimination.<sup>918</sup> It would not be permissible, however, for the occupying power to facilitate the recruitment of inhabitants into its armed or auxiliary forces by suspending a local law prohibiting voluntary military service on behalf of another State. Of course, the duty to respect and safeguard the pre-existing legal order of the occupied territory also applies to local authorities whose legislative activities are effectively controlled by the occupying power and who therefore lack the independence required to be able to act in the interest of the local population.

### **(b) General authority to legislate**

The occupying power's duty to respect and apply the local law of the occupied territory "unless absolutely prevented" also involves a qualified prohibition against introducing new laws. In interpreting the clause "unless absolutely prevented" as it applies to penal legislation, the Fourth Geneva Convention recognizes that the occupying power may promulgate new penal provisions for three purposes only: (a) to enable the occupying power to fulfil its obligations under IHL, (b) to maintain the orderly government of the territory, and (c) to ensure the security of the personnel, property and communication infrastructure of the occupying power's armed forces and administration.<sup>919</sup> This list of legitimate legislative purposes is exhaustive. It also provides authoritative guidance for construing the occupying power's legislative powers in other areas, such as administrative and procedural law. For example, if necessary, the occupying power must be allowed to promulgate new legislation aimed at: giving the delegates of the Protecting Power or the ICRC access to protected persons held in solitary confinement; introducing a general prohibition forbidding civilians to carry weapons; or at establishing a system of procedural guarantees for the periodic review of security measures taken in the occupied territory, such as assigned residence and internment.

### **(c) Special rules on penal legislation**

#### ***Promulgation and application by the occupying power***

In principle, in situations of belligerent occupation, existing local criminal tribunals should continue to adjudicate all cases relating to offences against the penal legislation in force in the occupied territory.<sup>920</sup> However, any penal provisions promulgated by the occupying power in accordance with its legislative powers must be non-retroactive and can come into force only after they have been published and brought to the knowledge of the inhabitants

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918 J.S. Pictet (ed.), *Commentary on the Fourth Geneva Convention*, op. cit.(note 387), p. 335.

919 GC IV, Art. 64(2).

920 GC IV, Art. 64(1).

in their own language.<sup>921</sup> Offences against penal provisions so promulgated may be adjudicated by the occupying power's own military courts, provided they have been regularly constituted and are non-political. This excludes any form of special or ad hoc tribunal constituted for political purposes without sufficient supervision by the regular military justice system. Moreover, first-instance courts must necessarily, and courts of appeal should preferably, sit in the occupied territory.<sup>922</sup> The military courts of the occupying power may apply only penal provisions that were applicable at the time of the offence (*nulla poena sine lege*) and that are in accordance with other general principles of law, in particular the principle that any penalty must be proportionate to the offence.<sup>923</sup> Other general principles of law relevant to penal proceedings include the presumption of innocence (*in dubio pro reo*) and the prohibition against trying the same person twice on the same charge, or double jeopardy (*non bis in idem / res judicata*).

### ***Permissible penalties***

When determining the sentence for any offence against penal provisions promulgated by the occupying power, the courts must take into consideration the fact that the accused is not a national of the occupying power and consequently has no duty of allegiance towards it.<sup>924</sup> Minor offences solely intended to harm the occupying power, and that do not involve an attempt to kill or wound its military or administrative personnel, to seriously damage its property or installations, or to cause grave collective danger, may not be punished more severely than by simple imprisonment or by internment, in either case of a duration proportionate to the offence. The rationale for using internment as opposed to simple imprisonment as a sanction for minor offences against the occupying power is to give relatively harmless offenders motivated by patriotism the benefit of conditions that are more lenient and less stigmatizing than those afforded petty criminals.<sup>925</sup> More serious offences against the penal provisions promulgated by the occupying power may be punished more severely but always with due respect for the humane treatment requirements of IHL, most notably the prohibitions against collective punishment and against cruel, inhuman and degrading punishment. The death penalty may be imposed only for espionage, serious acts of sabotage and intentional homicide, and only if: (a) such offences were already punishable by death under the local law prior to the occupation;<sup>926</sup> (b) the accused was at least 18 years of age at the time of

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921 GC IV, Art. 65.

922 GC IV, Art. 66.

923 GC IV, Art. 67; CIHL, Rule 101.

924 GC IV, Art. 67.

925 GC IV, Art. 68(1). On punitive internment, see also Chapter 5.III.1.a.

926 GC IV, Art. 68(2).

the offence;<sup>927</sup> and (c) the attention of the court has been particularly called to the fact that the accused is not bound to the occupying power by any duty of allegiance, since he is not one of its nationals.<sup>928</sup>

### *Offences committed before occupation*

The occupying power's right to exercise criminal jurisdiction in the occupied territory is temporally restricted to the period during which it actually exercises military control over the territory. The occupying power may therefore not arrest, prosecute or convict protected persons for acts committed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war, for which there is universal jurisdiction.<sup>929</sup> This jurisdictional limitation even applies to refugees who are the occupying power's own nationals, provided that they sought refuge in the territory of the occupied State before the outbreak of hostilities and are not accused of offences under common law that would have justified their extradition under the law of the occupied State applicable in peacetime.<sup>930</sup>

### **To go further (Inhabitants of occupied territories)<sup>931</sup>**

- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, [Chapter 8: The protection of civilians](#), pp. 231–248.
- Peter Maurer, "[Challenges to international humanitarian law: Israel's occupation policy](#)," *IRRC*, Vol. 94, No. 888, 2012, pp. 1503–1510.
- Alan Baker, "[International humanitarian law, ICRC and Israel's status in the Territories](#)," *IRRC*, Vol. 94, No. 888, 2012, pp.1511–1521.
- Tristan Ferraro, "[Determining the beginning and end of an occupation under international humanitarian law](#)," *IRRC*, Vol. 94, No. 885, 2012, pp. 133–163.
- "[Occupation](#)," *IRRC*, Vol. 94, No. 885, Spring 2012.

927 GC IV, Art. 68(4).

928 GC IV, Art. 68(3).

929 GC IV, Art. 70(1).

930 GC IV, Art. 71(1).

931 All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

### *How Does Law Protect in War?*

- Case No. 123, [ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory](#)
- Case No. 125, [Israel, Applicability of the Fourth Geneva Convention to Occupied Territories](#)
- Case No. 141, [United Kingdom, Position on Applicability of Fourth Convention](#)
- Case No. 161, [Eritrea/Ethiopia, Awards on Occupation](#)
- Case No. 236, [ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo](#)

→ See also the references listed at the end of Chapter 2.

## IV. HUMANITARIAN ASSISTANCE

### 1. Primary responsibility

The provisions of IHL on humanitarian assistance are based on the assumption that each belligerent party has the primary obligation to meet the basic needs of the population under its control. While this duty is presumed to be self-evident as it relates to territorial States and their own population, it is expressly spelled out for contexts of belligerent occupation. The Fourth Geneva Convention specifically provides that, “[t]o the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population” and, “if the resources of the occupied territory are inadequate,” must bring in the necessary foodstuffs, medical stores, clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population and objects necessary for religious worship.<sup>932</sup> In principle, therefore, humanitarian assistance should be understood as a subsidiary, complementary and temporary means of helping the belligerent party concerned to fulfil its own obligations towards the population under its control.

### 2. Basic duty to allow and facilitate relief to civilians

IHL prohibits the use of starvation of the civilian population as a method of warfare,<sup>933</sup> and obliges each belligerent party and non-belligerent States to

<sup>932</sup> GC IV, Art. 55(1); AP I, Art. 69(1).

<sup>933</sup> AP I, Art. 54(1); CIHL, Rule 53. See also Chapter 3.II.2.c.

allow and facilitate impartial humanitarian relief for civilian populations in need of supplies essential to their survival.<sup>934</sup> The treaty provisions regulating such humanitarian assistance can be categorized into three distinct duties: (a) the general duty of all States and each belligerent party to allow and facilitate the free passage of relief consignments intended for civilians in other States; (b) the particular duty of the occupying power to ensure the provision of essential supplies to the civilian population of the occupied territory; and (c) the duty of belligerent parties to allow and facilitate the provision of humanitarian relief to other territories under their control. IHL also provides the civilian population and individual civilians with the right to communicate their needs to the Protecting Power and relief organizations, and regulates the duties of belligerent parties with regard to humanitarian personnel participating in such relief operations.

**(a) Free passage of relief consignments to civilians in other States**

In situations of international armed conflict, the Fourth Geneva Convention and Additional Protocol I establish that all belligerent parties and non-belligerent States have a general duty to allow and facilitate the free passage of relief consignments aimed at providing supplies essential for the survival of any civilian population outside their territory or control.<sup>935</sup> Humanitarian relief shipments must be protected against the dangers arising from military operations.<sup>936</sup> They must be forwarded as rapidly as possible and may not be delayed or diverted from their intended purpose except in cases of urgent necessity in the interest of the civilian population concerned.<sup>937</sup> Each State or belligerent party allowing free passage may, however, inspect such shipments and require that they be distributed under the local supervision of the Protecting Power.<sup>938</sup> The free passage of humanitarian assistance to civilians in need may not be refused on the grounds that the delivery of such goods and services could be used to support the general war effort or the economy of the enemy. Such a refusal could be justified only in exceptional circumstances, where there are serious reasons to believe that the supplies in question may be diverted for military purposes rather than distributed to the intended beneficiaries, or where relief shipments would flood a conflict area with quantities of goods and services clearly exceeding the needs of the civilian

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934 CIHL, Rules 55 and 56.

935 GC IV, Arts 23(1), 59(3) and 61(3); AP I, Art. 70(2); CIHL, Rule 55.

936 GC IV, Art. 59(3); AP I, Art. 70(4).

937 GC IV, Art. 23(4); AP I, Art. 70(3) and (4).

938 GC IV, Arts 23(3) and (4), and 59(4); AP I, Art. 70(3).

population, thus depriving such action of its humanitarian necessity and justification.<sup>939</sup>

**(b) Relief consignments for civilians in occupied territory**

The occupying power has a legal duty to ensure, to the fullest extent of the means available to it, the provision of food, medical supplies, clothing, bedding, shelter, and other supplies essential to the survival of the civilian population.<sup>940</sup> Accordingly, if all or part of the occupied territory is inadequately supplied, the occupying power must either bring in the necessary goods or allow relief operations in behalf of the civilian population by other States or by impartial humanitarian organizations such as the ICRC.<sup>941</sup> In principle, protected persons in occupied territories must also be permitted to receive individual relief consignments sent to them.<sup>942</sup> The delivery of humanitarian assistance by other States, organizations or private individuals does not, however, relieve the occupying power of any of its responsibilities towards the population of the occupied territory.<sup>943</sup> Once such relief consignments have arrived in the occupied territory, the occupying power must facilitate their rapid distribution<sup>944</sup> and may not divert them from their intended purpose, except in cases of urgent necessity in the interest of the local population and with the consent of the Protecting Power.<sup>945</sup> The distribution of humanitarian relief supplies in occupied territory must be carried out with the cooperation and under the supervision of the Protecting Power or of an impartial humanitarian organization such as the ICRC.<sup>946</sup>

**(c) Relief consignments for civilians in non-occupied territory**

If the civilian population of any territory other than occupied territory is not adequately provided with the supplies essential to its survival, treaty IHL does not expressly oblige the belligerent party controlling that territory to ensure adequate supplies. However, in the view of the ICRC, the obligation to meet the basic needs of the civilian population, besides being an essential element of State sovereignty, can be inferred by way of interpretation from the object and purpose of IHL and from the obligation incumbent upon parties to a conflict to treat all persons in their power humanely. In all cases, IHL requires that relief actions “be undertaken, subject to the agreement of

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939 GC IV, Art. 23(2); J.S. Pictet (ed.), *Commentary on the Fourth Geneva Convention, op. cit.* (note 387), pp. 182–183.

940 GC IV, Art. 55(1); AP I, Art. 69(1).

941 GC IV, Art. 59(1) and (2); CIHL, Rule 55.

942 GC IV, Art. 62.

943 GC IV, Art. 60.

944 GC IV, Art. 61(2).

945 GC IV, Art. 60.

946 GC IV, Art. 61(1).



A. Niedringhaus/AP

ICRC vehicles arrive at a British checkpoint outside the city of Basra in southern Iraq, Saturday, 29 March 2003. An attempt by British forces surrounding Basra to open the way for badly needed humanitarian aid encountered resistance from Iraqi troops and paramilitaries. The ICRC vehicles had to turn back for security reasons.

the Parties concerned.<sup>947</sup> IHL specifies that any such relief action must be humanitarian, impartial and non-discriminatory in character, but requires that, in the distribution of relief consignments, priority be given to particularly vulnerable persons, such as children, expectant mothers, maternity cases and nursing mothers.<sup>948</sup> The requirement of consent reflects primarily a compromise in favour of national sovereignty. Its practical consequences should not be overstated, however, as the party in territorial control, whether the legitimate government, a national liberation movement or a multinational force mandated by the UN, is likely to have a strong political interest, if not a legal obligation under national law, to ensure adequate supplies for the civilian population. If a civilian population lacks supplies that are essential to its survival and if a humanitarian organization that provides relief on an impartial and non-discriminatory basis is able to remedy the situation, the State or belligerent party concerned has a legal obligation under customary IHL to give its consent.<sup>949</sup> IHL also stipulates that offers of impartial humanitarian relief may not be regarded as interference in an armed conflict or as unfriendly acts,<sup>950</sup> and that the States concerned and each belligerent party must even encourage and facilitate effective international coordination of

947 AP I, Art. 70(1).

948 AP I, Art. 70(1).

949 CIHL, commentary on Rule 55, p. 197.

950 AP I, Art. 70(1).

such assistance.<sup>951</sup> Finally, once relief consignments have arrived in a conflict area, the belligerent parties must protect them from the dangers of war and facilitate their rapid distribution.<sup>952</sup>

### 3. Relief organizations and personnel

The Fourth Geneva Convention stipulates that all protected persons, including those deprived of their liberty, have the right to communicate their needs to Protecting Powers, relief organizations such as the ICRC and the National Societies, or any other organizations offering humanitarian assistance.<sup>953</sup> Belligerent parties must, within the bounds of military or security considerations, grant such organizations the freedom of movement, rights of access and other facilities necessary to visit protected persons wherever they may be, and to distribute relief supplies and educational, recreational or religious materials to them.<sup>954</sup> The number of organizations allowed to carry out their activities in the areas concerned may be limited, but such limitation must not hinder the supply of effective and adequate relief to all protected persons.<sup>955</sup> Where necessary, and with the approval of the territorial State, relief personnel may participate in the transportation and distribution of relief consignments.<sup>956</sup> Such personnel and their equipment must be respected and protected.<sup>957</sup> Each belligerent party receiving relief consignments must support such relief personnel to the fullest extent practicable and may not restrict their activities and movements except where temporarily required for reasons of imperative military necessity.<sup>958</sup> Relief personnel must take into account the security requirements of the party in whose territory they are carrying out their duties and may under no circumstances exceed the terms of their mission. The mission of personnel who do not respect these conditions may be terminated.<sup>959</sup>

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951 AP I, Art. 70(5).

952 AP I, Art. 70(4).

953 GC IV, Art. 30(1).

954 GC IV, Arts 30(2) and (3) and 142(1); CIHL, Rule 56.

955 GC IV, Art. 142(2).

956 AP I, Art. 71(1).

957 AP I, Art. 71(2); CIHL, Rules 31 and 32.

958 AP I, Art. 71(3); CIHL, Rule 56.

959 AP I, Art. 71(4).



### To go further (Humanitarian assistance) <sup>960</sup>

- *Liberia: Hope at Last*, film, ICRC, 2006. Available at: <https://avarchives.icrc.org/Film/1051>
- Michael Bothe, “Relief actions: The position of the recipient State,” in Frits Kalshoven (ed.), *Assisting the Victims of Armed Conflict and Other Disasters*, Martinus Nijhoff, Dordrecht, 1989, pp. 91–98.
- Rebecca Barber, “[Facilitating humanitarian assistance in international humanitarian and human rights law](#),” *IRRC*, Vol. 91, No. 874, June 2009, pp. 371–399.
- Emanuela-Chiara Gillard, “[The law regulating cross-border relief operations](#),” *IRRC*, Vol. 95, No. 890, Summer 2013, pp. 351–382.
- Jelena Pejic, “[The right to food in situations of armed conflict: The legal framework](#),” *IRRC*, Vol. 83, No. 844, December 2001, pp. 1097–1110.
- Felix Schwendimann, “[The legal framework of humanitarian access in armed conflict](#),” *IRRC*, Vol. 93, No. 884, December 2011, pp. 993–1008.

### *How Does Law Protect in War?*

- Case No. 41, [ICRC, Assistance Policy](#)
- Case No. 124, [Israel/Gaza, Operation Cast Lead](#)
- Case No. 177, [UN, Security Council Resolution 688 on Northern Iraq](#)
- Case No. 278, [Angola, Famine as a Weapon](#)

## V. SPECIFIC ISSUES ARISING IN NON-INTERNATIONAL ARMED CONFLICTS

### 1. The civilian population in non-international armed conflicts

Non-international armed conflicts take place, not between States, but between States and organized armed groups or between such groups. Most non-international armed conflicts split the population of the affected States into opposing factions supporting one or the other party. While in the proxy conflicts of the Cold War the opposing factions were usually politically motivated, in many contemporary non-international armed conflicts the divisions between the parties mirror ethnic, religious or linguistic differences. All non-international armed conflicts have in common, however, that they

<sup>960</sup> All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

may involve nationals of the same State on opposing sides, thus making it difficult to accurately determine which part of the civilian population belongs to each belligerent or has fallen into the power of an adverse party. All non-international armed conflicts also have in common that the fighting forces of a least one party to the conflict are formed of armed non-State actors who, for all purposes other than the conduct of hostilities, are not provided with any legal status different from that of the civilian population.<sup>961</sup> IHL governing non-international armed conflicts therefore does not protect civilians based on their nationality, allegiance or status, or on the fact that they are in the power of an adverse party. Instead, it simply protects all persons who are not, or no longer, taking a direct part in hostilities, regardless of their status during the hostilities and regardless also of whether they are in the power of a State or of a non-State party. As will be seen, this specific approach permeates the entire body of IHL governing non-international armed conflicts and is therefore crucial to understanding it.

## 2. Humane treatment

The cornerstone of IHL governing non-international armed conflicts is common Article 3. Often held to be the single most important provision of contemporary treaty IHL, common Article 3 has rightly been described as a “Convention in miniature” within the Geneva Conventions.<sup>962</sup> In the view of the ICJ, it is a “minimum yardstick” expressing elementary considerations of humanity that must be regarded as binding in any armed conflict, regardless of treaty obligations.<sup>963</sup> In essence, common Article 3 provides that each party to a non-international armed conflict, whether represented by a government or an organized armed group, must comply as a minimum with the following basic rule:

“Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.”<sup>964</sup>

More specifically, common Article 3 prohibits the following acts “at any time and in any place whatsoever”:

961 On the protection of the civilian population during hostilities, see Chapter 3.

962 ICRC, *Commentary on the First Geneva Convention*, 2nd ed. (2015), *op. cit.* (note 64), Art. 3.

963 ICJ, *Nicaragua case*, *op. cit.* (note 27), para. 218. Confirmed in ICTY, *The Prosecutor v. Dusko Tadić*, *op. cit.* (note 70), para. 102.

964 GC I-IV, common Art. 3(1).

- (a) violence to life and person, in particular murder, mutilation, cruel treatment and torture;
- (b) hostage-taking;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Additional Protocol II develops and supplements the protection provided by common Article 3, most notably by formulating fundamental guarantees aimed at ensuring the humane treatment of all persons who do not, or no longer, take a direct part in hostilities, whether or not their liberty has been restricted. Such persons are entitled to respect for their person, honour and convictions and religious practices, and must in all circumstances be treated humanely, without any adverse distinction.<sup>965</sup> Additional Protocol II develops the list of acts that are prohibited “at any time and in any place whatsoever” as follows:

- (a) violence to the life, health and physical or mental well-being of persons, in particular murder, cruel treatment such as torture, mutilation or any form of corporal punishment;
- (b) collective punishment;
- (c) hostage-taking;
- (d) acts of terrorism;
- (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) slavery and the slave trade in all their forms;
- (g) pillage;
- (h) threats to commit any of the foregoing acts.<sup>966</sup>

These fundamental guarantees of humane treatment for persons not directly participating in hostilities are part of customary IHL applicable in non-international armed conflicts.<sup>967</sup>

### 3. Special protection for children

Experience shows that children affected by non-international armed conflicts are particularly exposed to the risk of being separated from their

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965 AP II, Art. 4(1).

966 AP II, Art. 4(2).

967 CIHL, Rules 87–105.

families, recruited as child soldiers, or otherwise physically and mentally abused. Additional Protocol II therefore provides that, if required for their protection, children should be temporarily removed from the area of hostilities to a safer area within the country, whenever possible with the consent of the children's parents or other guardians. In any event, evacuated children must be accompanied by persons responsible for their safety and well-being. All appropriate steps must be taken to facilitate the reunification of families who have been temporarily separated and, in the meantime, children must be given an education in keeping with the wishes of their parents or others responsible for their care. In no case may children below the age of 15 be recruited into armed forces or armed groups, or allowed to take part in hostilities. Moreover, children who are captured after having directly participated in hostilities contrary to this prohibition remain entitled to the special protection afforded to children under IHL.<sup>968</sup>

→ On the prohibition against child recruitment under human rights law, see Section I.4.b. above.

#### 4. Prohibition of forced displacement

The forced movement of parts of the civilian population has been a recurrent problem in non-international armed conflicts. Often described as “ethnic cleansing,” such forced movements are usually rooted in policies of ethnic or racial hatred; they tend to be accompanied by the most shocking atrocities, ranging from systematic rape, looting and murder to outright genocide.<sup>969</sup> Needless to say, in almost all cases the humanitarian consequences of forced population movements are disastrous. Additional Protocol II therefore prohibits the parties to a conflict from ordering the forced displacement of the civilian population for reasons related to the conflict, unless required for the security of the civilians involved or for imperative military reasons.<sup>970</sup> It is clear that this prohibition is not intended to prevent the voluntary movement of the civilian population or of individual civilians trying to escape the dangers of the combat zone, or for any other reason,<sup>971</sup> nor does it cover forced displacements for reasons unrelated to the armed conflict, such as the forcible evacuation of areas affected by natural disasters.<sup>972</sup> In those exceptional cases where forcible displacement within a territory is permitted, all

968 AP II, Art. 4(3).

969 The conflicts in the former Yugoslavia (1991–1999) and the genocide in Rwanda (1994) are well-documented examples of such policies.

970 AP II, Art. 17(1); CIHL, Rule 129 B.

971 Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols*, *op.cit.* (note 186), para. 4851.

972 Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols*, *op. cit.* (note 186), para. 4855.



M. Di Lauro/Getty Images/ICRC

ICRC physical rehabilitation centre in Najaf, Iraq, 2014. Father and son awaiting an assessment.

possible measures must be taken to ensure that the civilian population can be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.<sup>973</sup> Additional Protocol II also provides that civilians may not be compelled to leave “their own territory” for reasons connected with the conflict.<sup>974</sup> In principle, this means that civilians may not be expelled from the national territory of a State party to a conflict, as has tragically happened in a number of non-international armed conflicts.<sup>975</sup> In situations where an extensive part of the territory is controlled by an insurgent party, this prohibition could arguably be interpreted as also covering the expulsion of civilians from such areas.<sup>976</sup>

## 5. Relief consignments in non-international armed conflicts

Treaty IHL regulating humanitarian assistance in situations of non-international armed conflict is not as developed as that governing international armed conflicts. Nevertheless, just as in situations of international armed conflict, customary and treaty IHL governing non-international armed conflicts prohibits the use of starvation of the civilian population as a method

973 AP II, Art. 17(1); CIHL, Rule 131.

974 AP II, Art. 17(2).

975 For example, the expulsion from Kosovo to Albania and the former Yugoslav Republic of Macedonia of approximately 800,000 ethnic Albanians by Yugoslav forces in the spring of 1999.

976 Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols*, *op. cit.* (note 186), para. 4859.

of warfare<sup>977</sup> and obliges each party to a conflict to allow and facilitate the delivery of impartial humanitarian relief consignments for civilians in need of supplies essential to their survival.<sup>978</sup> More specifically, Additional Protocol II provides: “If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.”<sup>979</sup>

Both common Article 3 and Additional Protocol II also stipulate that impartial relief organizations, such as the ICRC or the National Societies, may offer to perform their traditional functions for the victims of an armed conflict.<sup>980</sup> Humanitarian relief operations inevitably require the consent of the territorial State. This requirement may prove problematic, particularly where the relief supplies in question are destined for territory controlled by an insurgent party to a conflict. Nevertheless, today, any arbitrary refusal by a government to allow impartial humanitarian assistance to its own population in such areas would, most likely, have to be regarded as unlawful not only as a matter of customary IHL, but also as a matter of human rights law.<sup>981</sup>

### To go further (Specific issues arising in non-international armed conflicts)<sup>982</sup>

- Jan Willms, “[Without order, anything goes? The prohibition of forced displacement in non-international armed conflict](#),” *IRRC*, Vol. 91, No. 875, December 2009, pp. 547–565.
- ICRC, [Enhancing Protection for Civilians in Armed Conflict and Other Situations of Violence](#), ICRC, Geneva, 2012, 90 pp.
- “Protecting civilians,” webpage, ICRC. Available at: <https://www.icrc.org/en/what-we-do/protecting-civilians>

977 AP II, Art. 14; CIHL, Rule 53. See also Chapter 3.II.2.c.

978 CIHL, Rules 55 and 56.

979 AP II, Art. 18(2).

980 GC I–IV, common Art. 3(2); AP II, Art. 18(1).

981 CIHL, commentary on Rule 55.

982 All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

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- Case No. 153, [ICJ, \*Nicaragua v. United States\*](#)
- Case No. 164, [Sudan, Report of the UN Commission of Inquiry on Darfur](#)
- Case No. 274, [Armed Conflicts in Sierra Leone, Liberia and Guinea \(1980–2005\)](#)
- Case, [UN Security Council Resolution on the Conflict in Syria](#) (only available online)





# Chapter 7

## Implementation and enforcement of IHL



T. Gassmann/ICRC

Geneva International Conference Centre, Switzerland. 31st International Conference of the Red Cross and Red Crescent, 2011.

## Structure

- I. Factors influencing compliance with IHL
- II. Duty of belligerents “to respect and to ensure respect”
- III. Ensuring respect at international level
- IV. State responsibility and reparations
- V. Individual criminal responsibility for violations of IHL
- VI. Judicial enforcement
- VII. Non-judicial enforcement
- VIII. Specific issues arising in non-international armed conflicts

### In a nutshell

- All States must respect and ensure respect for IHL in all circumstances. More specifically, States must take all necessary measures to implement IHL within their own jurisdictions; they must not encourage violations by belligerent parties, and must exert their influence, as far as possible, to end such violations.
- Moreover, all States must strive to find and prosecute or extradite any person alleged to have committed or ordered the commission of war crimes, and take all measures necessary to end any other violations of IHL.
- Military commanders and other superiors bear criminal responsibility for war crimes committed by persons under their effective control, if they failed to take all necessary and reasonable measures within their power to prevent or repress such crimes, or to refer the matter to the competent authorities for investigation and prosecution.
- As a general rule, national institutions and procedures are responsible for the adjudication and/or prosecution of IHL violations, while international mechanisms play a subsidiary and complementary role and are activated only if national mechanisms fail to operate effectively.
- In non-international armed conflicts, non-State armed groups must also ensure respect for IHL, and prevent and punish violations.
- In practice, the effective implementation and enforcement of IHL still largely depends on non-judicial mechanisms for monitoring, complaints and implementation.

### To go further<sup>983</sup>

- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, Chapter 13: [Implementation mechanisms](#), [State responsibility](#) and [Criminal repression](#), pp. 354–444.
- “[Generating respect for the law](#),” *IRRC*, Vol. 96, No. 895/896, Autumn–Winter 2014.

As we have seen in the preceding chapters, over the course of the last 150 years, IHL has become one of the most extensively codified areas of international law, supplemented by a comprehensive body of customary rules. Today, IHL imposes wide-ranging restrictions on the means and methods of warfare, and provides detailed regimes of protection for the civilian population and other categories of people affected by conflict. In doing so, contemporary IHL effectively disproves Cicero’s dictum, *silent enim leges inter arma* (in times of war, the laws fall silent), and makes it abundantly clear that armed conflicts, and those who engage in them, are not exempt from the rule of law.

Experience has shown, however, that the mere existence of humanitarian rules does not prevent or alleviate the immense suffering caused by armed conflicts, or ensure acceptable conduct by belligerents. Indeed, as the ICRC has observed, “the main cause of suffering during armed conflicts and of violations of IHL remains the failure to implement existing norms – whether owing to an absence of political will or for another reason – rather than a lack of rules or their inadequacy.”<sup>984</sup> It is therefore extremely important to examine the factors that influence compliance with IHL, as well as the various individual and collective measures that may be adopted to implement or enforce IHL.

## I. FACTORS INFLUENCING COMPLIANCE WITH IHL

Difficulties relating to the implementation and enforcement of IHL in actual conflict situations are often regarded as a weakness of this body of law. What purpose does the law of armed conflict serve when its rules are not respected and cannot be effectively enforced? Why should the same rules apply both to

983 All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

984 ICRC, “[International humanitarian law and the challenges of contemporary armed conflicts](#)’ Document prepared for the 30th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 26–30 November 2007,” Geneva, Switzerland, 26–30 November 2007, *IRRC*, Vol. 89, No. 867, September 2007, p. 721.

aggressor States and to States exercising their right to self-defence, or to both law-abiding belligerents and those who deliberately break the law? Why should belligerent action be restrained at all, when the whole purpose of war is to survive a potentially deadly threat from the enemy? Indeed, IHL is violated in almost all armed conflicts and by virtually all belligerent parties. Some of the atrocities committed in war have unleashed unspeakable horror and suffering on civilians and combatants alike. It is also true, however, that belligerents regularly show remarkable restraint and humanity, even under the most difficult circumstances, and often above and beyond what is required by IHL.

A broad range of factors influence compliance with IHL during war, including:

- **Self-interest:** the oldest and most effective motive for restricting the means and methods of warfare has always been military, economic and administrative self-interest. Particularly in territorial conflicts, the destruction of the enemy's logistical, industrial and agricultural infrastructure and the killing or displacement of large numbers of civilians not only renders military invasion and occupation more difficult, but also requires extensive humanitarian assistance and reconstruction efforts in the territories concerned. The tolerance of widespread violations and abuse by individual soldiers also undermines the discipline of the operating forces as a whole and significantly diminishes their military value.
- **Expectation of reciprocity:** at least in classic confrontations between uniformed armed forces or groups, the expectation of reciprocity continues to influence the behaviour of belligerents, even though IHL is binding regardless of whether it is respected by an enemy. Belligerents are more likely to treat captured civilians and prisoners of war with humanity and consideration if they can be confident that the opposing party will do the same. Expectations of reciprocity are increasingly undermined, however, in asymmetrical confrontations between highly organized, well-equipped belligerents and loosely organized forces, unable or unwilling to respect IHL.
- **Mutual trust and respect:** although relations between belligerents may have deteriorated to the point of armed conflict, their unconditional compliance with the laws and customs of war provides a basis for mutual respect and trust, which are indispensable to future efforts to achieve peace and reconciliation.

- **Public opinion:** particularly given the rapid development of communication technology during the past two decades, omnipresent media reporting of ongoing armed conflicts can have a decisive impact on domestic public opinion and exert considerable pressure on governments to ensure that their armed forces respect IHL. In certain cases, such reports may also trigger national or international inquiries, or even domestic or international criminal proceedings against alleged perpetrators. For example, in 2003, reports of the systematic torture and abuse of Iraqi prisoners held by the United States in Abu Ghraib prison caused a public scandal that greatly damaged the reputation of the United States government, and ultimately led to the prosecution and conviction of several members of the armed forces.
- **Criminalization as a deterrent:** last but not least, the conduct of belligerent parties and the individual politicians, soldiers and civilians acting on their behalf is also influenced by the prospect and stigma of criminal prosecution and sanctions. The primary responsibility for prosecuting IHL violations traditionally falls to States themselves. However, during the past two decades, several international criminal courts and tribunals have been successfully established. In spite of many difficulties and limitations, these bodies have considerably increased the effectiveness of prosecutions and the probability of sanctions for violations of IHL in cases where States are unable or unwilling to assume their primary responsibility in this respect.

#### To go further (Factors influencing compliance with IHL)<sup>985</sup>

- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, [Chapter 13: Implementation Mechanisms](#), pp. 441–444.
- ICRC, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations*, ICRC, Geneva, 2004, 120 pp. (update forthcoming in 2016).
- Greenberg Research Inc., *The People on War Report: ICRC Worldwide Consultation on the Rules of War*, 1999, 102 pp.
- Olivier Bangerter, “[Reasons why armed groups choose to respect international humanitarian law or not](#),” *IRRC*, Vol. 93, No. 882, June 2011, pp. 353–384.

## II. DUTY OF BELLIGERENTS

### “TO RESPECT AND TO ENSURE RESPECT”

#### 1. The general principle

The general principle governing the enforcement and implementation of IHL is that each State has a duty to respect and to ensure respect for IHL in all circumstances.<sup>986</sup> At the most basic level, it reflects the legal maxim *pacta sunt servanda*, according to which States must fulfil all obligations arising from a treaty to which they are party.<sup>987</sup> The treaty-law term “in all circumstances” also implies the principle of non-reciprocity, according to which belligerents must respect their humanitarian obligations even when those obligations are violated by their adversary.<sup>988</sup> Indeed, it is a particular feature of IHL that non-respect for humanitarian treaty obligations by one party cannot justify the suspension or termination of the treaty by any other party.<sup>989</sup> Nor can the denunciation of IHL treaties by a belligerent party take effect until after the end of any armed conflict ongoing at the time the denunciation was issued.<sup>990</sup> Moreover, belligerent reprisals are permitted only in extremely specific circumstances and must never be directed against protected persons or objects.<sup>991</sup> The ICJ even held that the duty to respect and ensure respect constituted a general principle of IHL, applicable in all armed conflicts and irrespective of treaty obligations.<sup>992</sup> Conceptually, this duty has several aspects, namely: (1) a *negative duty* to abstain from any deliberate violation of IHL; (2) a *positive internal duty* to ensure the national implementation and application of IHL; and (3) a *positive external duty* of States to exert bilateral or multilateral pressure on other States or belligerent parties to comply with IHL.

#### 2. National implementation and enforcement

In line with their duty to respect and to ensure respect for IHL, belligerent parties and non-belligerent States are expressly required to take “all necessary measures” to fulfil their obligations within their jurisdictions.<sup>993</sup> This may include a broad range of preventive, supervisory, and punitive measures, including: (a) domestic legislation and regulations; (b) instructions,

986 GC I–IV, common Art. 1; AP I, Art. 1(1); CIHL, Rule 139.

987 Vienna Convention on the Law of Treaties, Art. 26.

988 GC I–IV, common Arts 1 and 3; CIHL, Rule 140.

989 Vienna Convention on the Law of Treaties, Art. 60(5).

990 GC I–IV, Arts 62, 63, 142 and 158; AP I, Art. 99; AP II, Art. 25.

991 GC I, Art. 46; GC II, Art. 47; GC, III Art. 13; GC IV, Art. 33; CIHL, Rules 145–147.

992 ICJ, *Nicaragua case*, *op. cit.* (note 27), para. 220.

993 AP I, Art. 80(1). See also GC I, Art. 49(2); GC II, Art. 50(2); GC III, Art. 129(2); GC IV Art. 146(2).

military orders and legal advice; (c) training and the dissemination of all pertinent information; (d) the establishment of national IHL committees; (e) technical preparation; and (f) criminal repression.

#### (a) Domestic legislation and regulations

To ensure that IHL is respected in practice, it must become part of national law. Depending on the national legal system, IHL treaties may become directly binding as a matter of national law (*self-executing treaty law*).<sup>994</sup> Where treaty law does not automatically apply,<sup>995</sup> States have an international legal obligation to pass the relevant legislative acts to incorporate its provisions in national law.<sup>996</sup> In order to implement certain treaty provisions, States may need to pass new legislation at domestic level in order to bring national criminal law and proceedings into line with these provisions (*nulla poena sine lege*). For example, both the 1949 Geneva Conventions and Additional Protocol I expressly require States to “enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed” grave breaches of IHL,<sup>997</sup> and to ensure that their national legislation adequately prevents and punishes misuse of the distinctive emblems of the red cross, red crescent and red crystal.<sup>998</sup> There is no formal procedure for “incorporating” customary IHL in national law. However, in certain countries, customary international law may be directly invoked in judicial proceedings.<sup>999</sup>

#### (b) Orders, instructions and legal advice

In addition to enacting the relevant legislation, States and belligerent parties must also “give orders and instructions to ensure observance” of IHL and “supervise their execution.”<sup>1000</sup> The role of military commanders is of particular importance in this respect. States and belligerent parties must require military commanders to prevent and, where necessary, put an end to IHL violations committed by members of the armed forces under their command, or other persons under their control, and to report such violations to the competent authorities.<sup>1001</sup> In particular, commanders must ensure, commensurate with their level of responsibility, that members of the armed forces under their command are aware of their obligations under IHL.<sup>1002</sup> If

994 See, for example, the French Constitution (1958), Art. 55.

995 This is the case, for example, in the United Kingdom.

996 See the references to national implementing legislation in GC I, Art. 48; GC II, Art. 49; GC III, Art. 128; GC IV, Art. 145; AP I, Art. 84.

997 GC I, Art. 49(1); GC II, Art. 50(1); GC III, Art. 129(1); GC IV, Art. 146(1); AP I, Art. 85(1).

998 GC I, Art. 54; GC II, Art. 55.

999 This is the case, for example, in Israel. See High Court of Justice, *Public Committee against Torture in Israel et al. v. Government of Israel et al.*, 769/02, 2005, para. 19.

1000 AP I, Art. 80(2). See also GC I, Art. 45 and GC II, Art. 46.

1001 AP I, Art. 87(1).

1002 AP I, Art. 87(2); CIHL Rule 142.



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China, 2014. Military officers from around the world at the ICRC's Senior Workshop on International Rules governing Military Operations (SWIRMO).

commanders become aware that subordinates, or other persons under their control, have committed, or are about to commit, violations of IHL, they must take the necessary steps to prevent such violations and, where appropriate, initiate disciplinary or penal action against the perpetrators.<sup>1003</sup> In order to enable military commanders to fulfil their responsibilities, States and belligerent parties must ensure that, whenever necessary, legal advisers properly trained in IHL are available at the appropriate command level to provide advice on the application of IHL, and that the appropriate instruction is given to the armed forces.<sup>1004</sup> As indicated in Section V below, the special role of commanders does not relieve their subordinates of personal criminal responsibility for IHL violations.

### (c) Training and dissemination

In order to ensure respect for IHL, not only commanders, but all members of the armed forces must be adequately trained in its application. States must include IHL in military doctrine and training programmes, and take it into account when selecting military equipment. They must also ensure that an effective sanctions system exists both in peacetime and in wartime, and that all military and civilian authorities responsible for the practical application of IHL during armed conflict are fully acquainted with the relevant

<sup>1003</sup> AP I, Art. 87(3).

<sup>1004</sup> AP I, Art. 82; CIHL, Rule 141.



treaties.<sup>1005</sup> For example, persons involved in the legal review of new weapons, means or methods of warfare must be fully aware of all the applicable provisions of international law relating to the permissibility of such means or methods of warfare.<sup>1006</sup> Furthermore, authorities involved in investigating and prosecuting war crimes must be familiar not only with the substantive provisions of IHL, but also with the applicable judicial guarantees or other procedural safeguards. Moreover, troops participating in UN 'peace-support operations' must be fully acquainted with the principles and rules of IHL.<sup>1007</sup> Beyond ensuring that all military and civilian authorities receive IHL training in line with their responsibilities and needs, States are also obliged to disseminate IHL as widely as possible, including by encouraging the study of IHL at university level.<sup>1008</sup> The ultimate goal is to ensure that the entire population is familiar with – and supports – the basic principles of IHL, thus creating a social environment conducive to ensuring compliance with this crucial body of law.

#### (d) National IHL committees

Thanks to the encouragement and support of the ICRC, more than 100 States have already established national IHL committees to advise and assist their governments on the implementation and dissemination of IHL.<sup>1009</sup> While IHL does not expressly require the creation of such committees, they have proved useful in helping States to fulfil their IHL obligations and to coordinate the relevant government services and agencies. Ideally, national IHL committees should be composed of representatives of all State services responsible for the implementation and enforcement of IHL – such as the ministries of defence, foreign affairs, internal affairs, justice and education – as well as senior members of the armed forces, members of the legislative and judiciary branches, academic experts and representatives of National Societies. National IHL committees are often best placed to evaluate whether a State's IHL obligations have been adequately incorporated in the domestic legal order and, if they have not, to propose the relevant remedies. They can monitor, provide guidance and advise national authorities on the interpretation and application of IHL. They can also play an important role in the national dissemination and promotion of IHL, and training related thereto, in military, governmental and academic circles. Depending on the context, it may also

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1005 AP I, Art. 83(2).

1006 AP I, Art. 36.

1007 *United Nations Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, *op. cit.* (note 114), Section 3.

1008 GC I, Art. 47; GC II, Art. 48; GC III, Art. 127; GC IV, Art. 144; AP I, Art. 83. See also AP II, Art. 19; CIHL, Rules 142 and 143.

1009 The list is available at: <https://www.icrc.org/en/download/file/1135/table-of-national-ihl-committees-icrc-eng.pdf>

be useful for national IHL committees to share expertise, experience, good practices and challenges, and to cooperate in matters relating to IHL.

**(e) Technical preparations**

In order to ensure respect for IHL in situations of armed conflict, certain technical measures should already be taken in peacetime.<sup>1010</sup> This includes, first and foremost, the systematic legal review of new weapons, means and methods of warfare as required by Article 36 of Additional Protocol I, in order to examine their permissibility under IHL and other applicable provisions of international law. It is also possible for a previously lawful weapon system already in the arsenal of a State to become unlawful following the ratification or entry into force of a new weapons treaty, as was the case with the ratification by the Syrian Arab Republic of the Chemical Weapons Convention in 2013, and the entry into force in numerous States of the Anti-Personnel Mine Ban Convention or the Convention on Cluster Munitions. States must therefore establish procedures to identify and destroy such weapon systems.

→ On the obligation to conduct legal weapons reviews, see Chapter 3.V.5.

In order to protect hospitals, ambulances and medical personnel in situations of armed conflict, each State party to the 1949 Geneva Conventions should – already in peace time – notify the other States of the names of the societies that it has authorized to assist the regular medical services of its armed forces.<sup>1011</sup> Moreover, in practical terms, the relevant infrastructure should be marked with the distinctive emblem of the red cross, red crescent or red crystal during peacetime, and medical aircraft, including helicopters, should be marked and equipped with the technical means necessary to allow their identification by an opposing belligerent party. It should be noted, however, that such measures remain subject to the restrictions and regulations governing the peacetime use of the emblem.<sup>1012</sup> Similarly, civil defence installations, vehicles and personnel, cultural property and installations containing dangerous forces, such as dams or nuclear plants, should be marked with the respective distinctive signs foreseen under IHL.<sup>1013</sup>

→ On the use of the distinctive emblem, see Chapter 4.V.

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1010 GC I–IV, common Art. 2 refers to a “provision which shall be implemented in peacetime.”

1011 GC I, Art. 26(2).

1012 GC I, Art. 44; GC II, Art. 44; AP I, Art. 18; Art. 13 of the Regulations on the use of the Emblem of the Red Cross or the Red Crescent by the National Societies, adopted by the 20th International Conference of the Red Cross (Vienna, 1965) and revised by the Council of Delegates (Budapest, 1991).

1013 AP I, Arts 56(7) and 66(7); AP I, Annex I, Art. 16; Hague Convention on Cultural Property, Art. 6.

Last but not least, in terms of technical measures to better protect the civilian population in armed conflicts, States may jointly establish demilitarized zones already in peacetime.<sup>1014</sup> They may also unilaterally establish hospital and safety zones and localities, in which case they must notify each other accordingly.<sup>1015</sup> Furthermore, in order to avoid or minimize the exposure of civilians and civilian objects to incidental injury or damage, States should endeavour to separate fixed installations likely to become military targets during conflict from those likely to remain civilian objects. In particular, States should avoid locating such potential military targets in, or near, densely populated areas.<sup>1016</sup>

- On hospital and safety zones and localities, see Chapter 4.IV.1.
- On demilitarized zones, see Chapter 3.II.3.b.
- On precautions against attacks, see Chapter 3.III.3.

#### (f) Criminal repression and suppression of violations

States also have a duty to investigate alleged war crimes and prosecute or extradite suspected perpetrators, and to put an end to any other violations of IHL.<sup>1017</sup>

#### To go further (Duty of belligerents to “respect and to ensure respect”)<sup>1018</sup>

- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, [Chapter 13: Implementation mechanisms](#), pp. 356–363.
- Knut Dörmann and Jose Serralvo-Perez, “[Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations](#),” *IRRC*, Vol. 96, No. 895/896, Autumn–Winter 2014.
- Elizabeth Stubbins Bates, “[Towards effective military training in international humanitarian law](#),” *IRRC*, Vol. 96, No. 895/896, Autumn–Winter 2014.
- ICRC, “National Enforcement of International Humanitarian Law,” information kit, ICRC, Geneva, 2014. Available at: <https://www.icrc.org/eng/resources/documents/legal-fact-sheet/national-enforcement-ihl-information-kit.htm>

1014 AP I, Art. 60(2).

1015 GC I, Art. 23 and Annex I, Art. 7; GC IV, Art. 14 and Annex I, Art. 7.

1016 AP I, Art. 58; CIHL, Rule 23.

1017 See Section V.3. below.

1018 All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

- ICRC, [\*The Domestic Implementation of International Humanitarian Law: A Manual\*](#), ICRC, Geneva, 2013, 341 pp.
- ICRC, [\*Decision-Making Process in Military Combat Operations\*](#), ICRC, Geneva, 2013, 53 pp.
- ICRC, [\*Integrating the Law\*](#), ICRC, Geneva, 2007, 43 pp.
- ICRC, *Commentary on the First Geneva Convention*, 2nd ed., ICRC/Cambridge University Press, 2016, Article 1.

### ***How Does Law Protect in War?***

- Document No. 29, [\*European Union Guidelines on Promoting Compliance with International Humanitarian Law\*](#)
- Document No. 52, [\*First Periodical Meeting, Chairman's Report\*](#)
- Case No. 69, [\*Ivory Coast, National Interministerial Commission\*](#)
- Case No. 139, [\*UN, Resolutions and Conference on Respect for the Fourth Convention\*](#)

## **III. ENSURING RESPECT AT INTERNATIONAL LEVEL**

### **1. *Erga omnes* character of humanitarian obligations**

IHL gives rise to *erga omnes* obligations, namely legal duties not only towards opposing belligerent parties, but towards all other States party to a particular treaty or, in the case of customary law, towards the international community as a whole.<sup>1019</sup> Therefore, all States, irrespective of their involvement in an armed conflict, are legally entitled to issue a demand to any belligerent party to respect IHL and to put an end to alleged violations. Beyond this discretionary right, however, the external aspect of the obligation to ensure respect for IHL in all circumstances also implies that States have a negative duty not to encourage violations of IHL by belligerent parties,<sup>1020</sup> as well as a positive duty to exert their influence, as far as possible, to end such violations.<sup>1021</sup>

1019 GC I–IV, common Art. 1.

1020 See Section IV.2.

1021 ICRC, *Commentary on the First Geneva Convention*, 2nd ed., 2016, *op. cit.* (note 64), Art. 1; CIHL, Rule 144.

## 2. Means of influence available to individual States

Individual States may try to influence belligerent parties through diplomatic channels, confidential representations or public appeals, and through legal action before any competent international judicial forum.<sup>1022</sup> However, violations of IHL by one State cannot in themselves provide a legal basis for armed intervention by third States, whether in the form of “humanitarian intervention,” or action in accordance with what has become known, within the UN framework, as the “responsibility to protect” (R2P).<sup>1023</sup> The lawfulness of the use of force between States is a matter of *jus ad bellum*, regulated by the UN Charter and customary law, which is a normative framework distinct from IHL. In practice, individual States or groups of States regularly bring their concerns regarding respect for IHL in certain contexts before regional or international organizations, such as the African Union or the UN, which are often able to exert stronger political, economic or military influence than individual States.

## 3. Enforcement through the UN system

### (a) Duty to “ensure respect” for IHL and the objectives of the UN

IHL violations are committed in virtually all armed conflicts by nearly all the parties involved. As long as unlawful conduct remains limited to isolated and sporadic acts committed by individual soldiers or units, they can be dealt with adequately through the internal preventive, supervisory and repressive mechanisms of the party concerned. Where IHL violations reach a certain level of gravity or frequency, however, treaty IHL expressly refers States to the UN system. Thus, in situations involving serious violations of the 1949 Geneva Conventions or of Additional Protocol I, the States party to these instruments are obliged “to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.”<sup>1024</sup> Indeed, it is one of the specific objectives of the UN to achieve international cooperation, *inter alia*, in solving international humanitarian problems and promoting respect for human rights.<sup>1025</sup> Moreover, serious IHL violations are likely to exacerbate ongoing conflicts and, therefore, further undermine international peace and security.

### (b) The duty to “ensure respect” and the “responsibility to protect”

The duty of States to cooperate with the UN in responding to serious violations of IHL is partly reflected in the concept of the responsibility to

1022 See Section VII.

1023 See Section III.3.b. See also *2005 World Summit Outcome*, A/RES/60/1, United Nations, New York, 24 October 2005, paras 138–139. Available at: <http://www.un.org/women-watch/ods/A-RES-60-1-E.pdf>

1024 AP I, Art. 89.

1025 UN Charter, Art. 1.

protect (R2P). R2P, which is non-binding, was adopted in 2005 within the UN framework and is based on the following three pillars: (1) States are responsible for protecting their own citizens from “mass atrocity crimes,” namely genocide, war crimes, crimes against humanity, and ethnic cleansing; (2) the international community is responsible for assisting States in fulfilling their own primary responsibility; and (3) if a State manifestly fails to protect its citizens, and peaceful measures have failed, the international community must be prepared to intervene, including through the use of coercive measures such as economic sanctions or, subject to authorization by the UN Security Council, military intervention.<sup>1026</sup> While R2P is not legally binding, it has a broader scope than IHL in that it also covers crimes other than IHL violations, and explicitly provides for the possibility of military intervention, if authorized by the UN.

**(c) The role of UN organs, mechanisms and agencies**

In the majority of contemporary armed conflicts, one or several UN organs, mechanisms or agencies are involved in some way. First and foremost, at the political level, the UN Security Council, the UN Secretary-General, the UN General Assembly,<sup>1027</sup> the Human Rights Council, and the various Special Rapporteurs, expert groups and agencies established or mandated within the UN framework regularly express their concerns, views and recommendations with regard to IHL violations. Moreover, the Offices of the United Nations High Commissioner for Refugees (UNHCR) and for Human Rights (OHCHR), as well as UN agencies such as the World Food Programme (WFP), the United Nations Development Programme (UNDP) and the United Nations Children’s Fund (UNICEF), often deal with, and provide assistance to, persons affected by armed conflict, including victims of IHL violations. Although UN organs and agencies are not necessarily neutral and impartial humanitarian actors, their public statements and practice certainly have a considerable impact on belligerent parties and international public opinion in general. It is beyond the scope of this book to provide a comprehensive overview at this point of how UN organs, mechanisms and agencies contribute to ensuring respect for IHL, but we will briefly consider the unique role of the UN Security Council in this regard.

**(d) The special role of the UN Security Council**

If the UN Security Council deems that the scale or intensity of IHL violations occurring in a particular context is a threat to international peace and security, it can decide on measures to be taken under Chapters VI and

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<sup>1026</sup> See 2005 *World Summit Outcome*, *op. cit.* (note 1023).

<sup>1027</sup> For examples, see the case studies from *How Does Law Protect in War?* in “To go further (Ensuring respect internationally).”

VII of the UN Charter, in order to put an end to the unlawful conduct. In practice, the Council will first adopt a resolution calling on the State concerned to respect its international obligations.<sup>1028</sup> Depending on the circumstances, the Council may also call on all other States to cease or abstain from providing support to the perpetrator.<sup>1029</sup> The Council may also deploy peacekeepers to supervise the proper implementation of its resolutions, or to observe how the situation develops on the ground. Should the State in question be unwilling to cooperate with the UN, the Council may impose economic sanctions or other coercive measures including, as a last resort, the use of force. It is important to note, however, that the primary purpose of action taken by the Security Council, in accordance with the UN Charter, is to maintain or restore international peace and security, and not necessarily to ensure respect for IHL.

Since the end of the Cold War, the Security Council's work has increasingly involved measures to ensure IHL compliance. The Security Council is currently the only multilateral institution capable of effectively enforcing international law, even against the will of the States concerned. Despite the Council's primarily political mandate and selective practice, some of its responses to serious violations of IHL have contributed decisively to strengthening the credibility and implementation of this body of law. Measures worthy of mention include the establishment of the ICTY and the ICTR,<sup>1030</sup> the creation of the United Nations Compensation Commission for Iraq,<sup>1031</sup> and the referral of the situations in Darfur and in Libya to the International Criminal Court.<sup>1032</sup> Another important recent development is that the Security Council now almost routinely includes protection activities in the mandates of UN peacekeeping forces, State coalitions and regional organizations, including authorization to use force – if necessary – to protect civilians and guarantee humanitarian access.<sup>1033</sup> The Security

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1028 The UN Security Council has done this in various resolutions concerning, *inter alia*, the conflicts in Iraq (e.g. Resolution 1483, 22 May 2003), Lebanon (Resolution 1701, 11 August 2006), Somalia (Resolution 1863, 16 January 2009), Afghanistan (e.g. Resolution 1917, 22 March 2010) and Sudan (e.g. Resolution 1919, 29 April 2010).

1029 For example, UN Security Council Resolutions 465 of 1 March 1980 (para. 7) and 471 of 5 June 1980 (para. 5) concerning Israel and the occupied Palestinian territory.

1030 UN Security Council Resolutions 827 (25 May 1993) and 955 (8 November 1994), respectively.

1031 UN Security Council Resolution 692 (20 May 1991).

1032 UN Security Council Resolutions 1593 (31 March 2005) and 1970 (26 February 2011).

1033 UN peacekeeping missions tasked with such a protective mandate include: UNAMSIL in Sierra Leone; MONUC and MONUSCO in the Democratic Republic of the Congo; UNMIS in Sudan; MINURCAT in the Central African Republic and Chad; UNIFIL in Lebanon; and UNOCI in Côte d'Ivoire. Examples of regional peacekeeping forces or coalitions of States having such a mandate are the joint UN/African Union forces in Darfur (UNAMID), the European Union forces in Chad, the Central African Republic and the Democratic Republic of the Congo, and the French forces in Côte d'Ivoire.

Council has also created several working groups and engaged in debates on the protection of vulnerable categories of people, such as civilians, children and humanitarian workers in armed conflicts.<sup>1034</sup> Last but not least, in a resolution addressing the protection of civilians in armed conflicts in general, the Security Council has also urged all States to respect IHL, without reference to any specific conflict.<sup>1035</sup>

#### 4. Multilateral conferences

##### (a) International Conference of the Red Cross and Red Crescent

The quadrennial International Conference of the Red Cross and Red Crescent brings together all States party to the 1949 Geneva Conventions and all the Movement's components, namely the ICRC, the National Societies and the International Federation. The International Conference is the supreme deliberative body of the Movement. It endeavours to foster unity within the Movement and to debate important humanitarian issues. The resolutions adopted during the Conference guide its participants in carrying out their humanitarian activities. While the Conference aims to promote respect for IHL and to contribute to its development, it carefully avoids being drawn into questions relating to the implementation of IHL in specific contexts, as the participants are wary of the Conference becoming politicized – and possibly polarized.

##### (b) Meetings of States Parties

Additional Protocol I provides for the possibility of a meeting of the High Contracting Parties to “consider general problems concerning the application of the Conventions and of the Protocol.”<sup>1036</sup> These meetings are to be convened by Switzerland, as the depositary of the Protocol, at the request of one or more States party to the Protocol, albeit only on the approval of the majority of States Parties. The purpose of the meeting is limited to considering general problems relating to the application of IHL; participating States can neither investigate specific contexts nor adjudicate or otherwise pronounce on the merits of allegations involving IHL violations. No such meeting has been organized since Additional Protocol I came into force.

Instead, in 1998, the Swiss government convened the First Periodical Meeting of States party to the Geneva Conventions on general problems relating to the application of IHL, based on the mandate given to the depositary by the 26th International Conference of the Red Cross and Red Crescent (1995). The meeting was attended by representatives of the 129 States party to the 1949

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1034 See, for example, UN Security Council Resolutions 1674 (28 April 2006), 1612 (26 July 2005) and 1502 (26 August 2003). For information on a number of issues and debates, see <http://www.securitycouncilreport.org/thematic-general-issues.php>

1035 UN Security Council Resolution 1265 (17 September 1999), para. 4.

1036 AP I, Art. 7.



Geneva Conventions at the time and 36 observer delegations. The discussions centred on two general topics relating to the implementation of IHL, namely: (1) respect for and security of the personnel of humanitarian organizations; (2) armed conflicts linked to the disintegration of State structures. At the request of States, the debates were informal and no new texts were negotiated. However, a non-binding report was produced by the chairperson. Although such periodic meetings do provide a forum for States party to the Conventions to discuss general issues relating to the implementation of IHL, no further meetings have been organized to date.

### To go further (Ensuring respect internationally)<sup>1037</sup>

- François Bugnion, “[The International Conference of the Red Cross and Red Crescent: Challenges, key issues and achievements](#),” *IRRC*, Vol. 91, No. 876, December 2009, pp. 675–712.
- Katharine Fortin, “[Complementarity between the ICRC and the United Nations and international humanitarian law and international human rights law, 1948–1968](#),” *IRRC*, Vol. 94, No. 888, December 2012, pp. 1433–1454.
- Toni Pfanner, “[Various mechanisms and approaches for implementing international humanitarian law and protecting and assisting war victims](#),” *IRRC*, Vol. 91, No. 874, June 2009, pp. 279–328.
- Marco Roscini, “The United Nations Security Council and the Enforcement of International Humanitarian Law,” *Israel Law Review*, Vol. 43, pp. 330–359.
- ICRC, *Commentary on the First Geneva Convention*, 2nd ed., ICRC/Cambridge University Press, 2016, Article 1.

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- Case No. 57, [UN, Guidelines for United Nations Forces](#)
- Document No. 59, [UN, Review of Peace Operations](#)
- Document No. 122, [ICRC Appeals on the Near East \[Part C., paras 10–11\]](#)
- Case No. 171, [Iran/Iraq, United Nations Security Council Assessing Violations of International Humanitarian Law](#)
- Case No. 211, [ICTY, \*The Prosecutor v. Tadic\*, Part. A](#)
- Case No. 234, [ICTR, \*The Prosecutor v. Jean-Paul Akayesu\*](#)

### **Textbox 9: Swiss/ICRC initiative on strengthening the implementation of IHL**

Since 2011, the ICRC has been involved in a joint initiative with the Swiss government aimed at strengthening compliance with IHL by establishing more effective international mechanisms. Unlike most other branches of international law, IHL has a limited number of compliance mechanisms, and no specific institutional structure to enable States to meet on a regular basis to discuss IHL issues.

The mandate for the initiative was provided by a resolution adopted at the 31st International Conference of the Red Cross and Red Crescent in 2011, which drew on the ICRC's thinking, over a long period of time, on the challenges posed by lack of compliance with IHL. The joint ICRC/Swiss consultation process has primarily involved a series of multilateral meetings of States, with background documents that contain key questions designed to facilitate debate. Bilateral discussions have also been held with States and other relevant stakeholders. A wide range of possible options have been put forward, including periodic reporting, meetings of States, fact-finding, good offices, early warnings, urgent appeals and thematic discussions. As the consultation process has progressed, discussions have increasingly focused on particular functions that the majority of participating States have designated as a priority, including establishing meetings of States, as the cornerstone of this system. These meetings could provide a forum for regular dialogue between States on IHL issues and serve as an anchor for several compliance functions, including periodic national reporting on compliance with IHL, and regular thematic discussions on IHL issues. However, further work is required to define the details of these functions.

Establishing a new IHL compliance system involves many complex issues and challenges, and much work still remains to be done. One of the key challenges is that the system will be a voluntary one, as States are unwilling to amend the 1949 Geneva Conventions or adopt a new

treaty to address the issue. It will therefore be crucial to ensure the regular participation of all States. The ICRC and Switzerland issued a report of the four-year consultation process and submitted a draft resolution for consideration at the International Conference in December 2015. No agreement could be reached during the International Conference; however States decided to continue working towards an inclusive, State-driven intergovernmental process. Many States also reaffirmed their commitment to respecting IHL, including through bilateral dialogue with the ICRC, and to enhance its implementation through the International Conference and regional IHL forums. The ICRC will pursue a strengthened dialogue with States on their IHL obligations and continue working on the compliance issue.

- For further details, see 31st International Conference of the Red Cross and Red Crescent, Resolution 1 – *Strengthening legal protection for victims of armed conflicts*, 2011.
- See also “Strengthening Compliance with International Humanitarian Law (IHL): The Work of the ICRC and the Swiss Government,” webpage, ICRC. Available at: <https://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm>

#### IV. STATE RESPONSIBILITY AND REPARATIONS

Apart from a few instances, the failure of States to respect IHL entails the same consequences as any other internationally wrongful act, as regulated in the 1969 Vienna Convention on the Law of Treaties and the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, drawn up by the International Law Commission of the UN General Assembly.<sup>1038</sup>

##### 1. Responsibility of States for the conduct of their agents

Under international law, States are responsible for the conduct of persons or entities acting on their behalf or with their authorization or endorsement. This includes not only government personnel, such as members of the armed forces and the police or intelligence agencies (*de jure* State agents),<sup>1039</sup> but also persons empowered by national law to exercise governmental authority,<sup>1040</sup> or persons acting on the instructions or under control of a State, such

1038 United Nations, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles on State Responsibility), *Report on the Work of Its Fifty-Third Session* (23 April–1 June and 2 July–10 August 2001), General Assembly, Official Records, 56th Session, Supplement No. 10 (A/56/10), Chapter II, Commentary, para. 2, p.80.

1039 Draft Articles on State Responsibility, *op. cit.* (note 1038), Art. 4.

1040 Draft Articles on State Responsibility, *op. cit.* (note 1038), Art. 5.

as private military or security contractors (*de facto* State agents).<sup>1041</sup> The State remains legally responsible for the actions of its agents, provided they were acting in their official capacity, even if those agents exceeded their authority or disobeyed instructions.<sup>1042</sup> In international armed conflicts, the responsibility of States extends to “all acts committed by persons forming part of its armed forces,” including acts committed outside their official capacity as members of the armed forces.<sup>1043</sup> In principle, therefore, all military operations carried out on behalf of a State may be directly attributed to that State, regardless of where they take place, where their impact is felt, or whether they contravene the instructions of the State.

## 2. Contribution to the unlawful conduct of belligerent parties

A non-belligerent State may be held internationally responsible for assisting or abetting IHL violations committed by a belligerent State if: (1) the assisting State is aware that the conduct of the assisted State is unlawful, and (2) its assistance is intended to – and actually does – facilitate that conduct.<sup>1044</sup> For the assisting State to be held internationally responsible, its assistance must significantly contribute, but need not be indispensable or essential, to the unlawful conduct of the assisted State.<sup>1045</sup> Moreover, while the assisting State does not necessarily need to be aware of the *unlawfulness* of the assisted conduct, it must be aware of the *factual circumstances* that make it unlawful. Nevertheless, legal responsibility for providing unlawful support must be distinguished from direct responsibility for the supported violation of IHL. Thus, when a belligerent party resorts to means and methods of warfare contrary to IHL, other States knowingly assisting such operations by providing financial assistance, intelligence, weapons, personnel, or logistical support will be legally responsible for providing internationally wrongful support, but not necessarily for the operations themselves. For example, in the *Nicaragua Case* (1986), the ICJ ruled that the duty of States to respect and ensure respect for the 1949 Geneva Conventions implied “an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions,” and that the United States had violated this obligation by disseminating a manual on guerrilla warfare that provided operational guidance contrary to the principles of IHL. The ICJ did not, however, find any grounds to conclude that any resulting IHL violations committed

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1041 Draft Articles on State Responsibility, *op. cit.* (note 1038), Art. 8, paras 1–2, pp. 103–104; CIHL, Rule 149.

1042 Draft Articles on State Responsibility, *op. cit.* (note 1038), Art. 7.

1043 Hague Regulations, Art. 3; AP I, Art. 91. See also GC I, Art. 51; GC II, Art. 52; GC III, Art. 131; GC IV, Art. 148.

1044 Draft Articles on State Responsibility, *op. cit.* (note 1038), Art. 16, Commentary, para. 3.

1045 Draft Articles on State Responsibility, *op. cit.* (note 1038), Art. 16, Commentary, para. 5.

by the insurgents were, as such, directly imputable to the United States.<sup>1046</sup> Nevertheless, it cannot be excluded that activities significantly contributing to serious violations of IHL may entail a State duty to provide reparations, but also individual criminal responsibility for the personnel involved.<sup>1047</sup>

### 3. Reparations

When IHL is violated, the State that is responsible has a legal duty of reparation independent of specific treaty obligations. As the Permanent Court of International Justice famously stated, “It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation (...) Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.”<sup>1048</sup> Today, the duty to make reparation for violations is an integral part of IHL applicable in all armed conflicts<sup>1049</sup> and, for individuals, an integral part of international criminal law.<sup>1050</sup> Thus, victims of serious violations of IHL should receive reparation that, depending on the gravity of the violation and the loss or injury caused, may take various forms, including restitution (i.e. re-establishing the original situation), rehabilitation (e.g. in medical, psychological, legal or social terms), satisfaction (e.g. acknowledgement or apology), and guarantees of non-repetition.<sup>1051</sup> Financial compensation, in particular, should be provided for economically assessable damage, such as physical, mental, material or moral harm, and loss of earnings or earning potential.<sup>1052</sup>

Because IHL violations frequently result in extensive damage and involve large numbers of victims, monetary compensation awarded on the basis of individual judicial proceedings could easily become an excessive procedural and financial burden, without any realistic prospect of a satisfactory

1046 ICJ, *Nicaragua case*, *op. cit.* (note 27), paras 220 and 292.

1047 Rome Statute, Art. 25(3).

1048 Permanent Court of International Justice, *Factory at Chorzów*, Jurisdiction, Judgment, 13 September 1928, p. 21. Article 31 of the Draft Articles on State Responsibility (*op. cit.*, see note 1038) stipulates that: “the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.” See also ICJ, *The Wall Opinion*, *op. cit.* (note 36), paras 152–153; ICJ, *DRC v. Uganda*, *op. cit.* (note 81), para. 259.

1049 Hague Regulations, Art. 3; AP I, Art. 91; Second Protocol to the Hague Convention on Cultural Property, Art. 38; CIHL, Rule 150.

1050 Rome Statute, Art. 75.

1051 Draft Articles on State Responsibility, *op. cit.* (note 1038), Arts 30–31 and 34–39.

1052 For more information, see United Nations, *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, document A/RES/60/147, 21 March 2006, in particular paras 15–23. Available at: <https://www.icrc.org/casebook/doc/treaty/un-guidelines-right-remedy-reparation-violations-ihl-hrl.pdf>

settlement. Moreover, while Article 75 of the Rome Statute recognizes the right of victims to claim reparation from individual perpetrators, individual claims against belligerent States are often precluded by express provisions in peace settlements, sovereign immunity or the non-self-executing nature of the right to reparation under international law. Therefore, victims often have to submit complaints to their own government, which may then include such claims as part of a peace treaty or other political settlement with the opposing party to the conflict.<sup>1053</sup> Reparation may be provided to individuals through mechanisms established by the UN Security Council,<sup>1054</sup> or unilaterally by national legislation, executive bodies or courts. Where IHL violations also violate human rights law, such as in the case of torture or other cruel or inhuman treatment in detention, victims may pursue individual claims through regional or universal human rights mechanisms.<sup>1055</sup> In practice, the sensitive issue of reparations is often better handled through collective political settlements, complemented by more inclusive or comprehensive reparation and reconciliation measures, including those provided by means of transitional justice mechanisms, such as truth and reconciliation commissions. Historical examples of such collective settlements include the Potsdam Conference (1945) and the Paris peace treaties (1947), which dealt with the issue of war reparations to be paid by Germany and the other Axis Powers to the Soviet Union, and the Reparations Agreement between Israel and the Federal Republic of Germany (Luxembourg, 1952), which addressed the Holocaust reparations to be paid by West Germany to Israel.

### To go further (State responsibility and reparations)<sup>1056</sup>

- Natalino Ronzitti, “Access to justice and compensation for violations of the law of war,” in Francesco Francioni (ed.), *Access to Justice as a Human Right*, Oxford University Press, Oxford, 2007, pp. 95–134.
- “[Sanctions](#),” *IRRC*, Vol. 90, No. 870, June 2008.
- Emanuela-Chiara Gillard, “[Reparation for violations of international humanitarian law](#),” *IRRC*, Vol. 85, No. 851, September 2003, pp. 529–553.

<sup>1053</sup> See, e.g., the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina, established by the Agreement on Refugees and Displaced Persons annexed to the Dayton Peace Accords of 14 December 1995.

<sup>1054</sup> See, e.g., the United Nations Compensation Commission established by UN Security Council Resolution 687 (3 April 1991) and UN Security Council Resolution 692 (20 May 1991), for individual claims resulting from the 1990 Iraqi invasion of Kuwait.

<sup>1055</sup> See Section VI.2.

<sup>1056</sup> All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

- Liesbeth Zegveld, “[Remedies for victims of violations of international humanitarian law](#),” *IRRC*, Vol. 85, No. 851, September 2003, pp. 497–527.
- Marco Sassòli, “[State responsibility for violations of international humanitarian law](#),” *IRRC*, Vol. 84, No. 846, June 2002, pp. 401–434.
- Dieter Fleck, “International accountability for violations of the *jus in bello*: The impact of the ICRC Study on customary international humanitarian law,” *Journal of Conflict and Security Law*, Vol. 11, No. 2, 2006, pp. 179–199.
- Yaël Ronen, “Avoid or compensate? Liability for incidental injury to civilians inflicted during armed conflict,” *Vanderbilt Journal of Transnational Law*, Vol. 42, No. 1, 2009, pp. 181–225.

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- Case No. 53, [International Law Commission, Articles on State Responsibility](#)
- Case No. 153, [ICJ, Nicaragua v. United States](#)
- Case No. 164, [Sudan, Report of the UN Commission of Inquiry on Darfur, paras 593–600](#)
- Case No. 180, [UN Compensation Commission, Recommendations](#)
- Case No. 222, [United States, Kadić et al. v. Karadžić](#)

## **V. INDIVIDUAL CRIMINAL RESPONSIBILITY FOR VIOLATIONS OF IHL**

### **1. Individual criminal responsibility**

#### **(a) Scope of criminal and civil responsibility**

After World War II, the International Military Tribunals at Nuremberg and Tokyo prosecuted suspected war criminals based on the assumption that the principle of individual criminal responsibility for war crimes had become part of customary international law.<sup>1057</sup> Today, the principle of individual criminal responsibility for war crimes in both international and non-international armed conflicts is recognized in numerous IHL treaties,<sup>1058</sup> and in

<sup>1057</sup> Charter of the International Military Tribunal, Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945, Art. 6; Charter of the International Military Tribunal for the Far East, 19 January 1946 and as amended, 26 April 1946, Art. 5.

<sup>1058</sup> See, most notably, GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; AP I, Art. 85; Hague Convention on Cultural Property, Art. 28; Second Protocol to the Hague Convention on Cultural Property, Arts. 15 and 22; Amended Protocol II to the Convention on Certain Conventional Weapons, Art. 14; Anti-Personnel Mine Ban Convention, Art. 9; Convention on Cluster Munitions, Art. 9. The Convention on Certain Conventional Weap-

the Statutes of the ICTY, the ICTR, the Special Court for Sierra Leone (SCSL) and the International Criminal Court;<sup>1059</sup> and its customary nature can no longer be disputed in relation to any type of armed conflict.<sup>1060</sup>

In prosecuting individuals for war crimes, difficult questions arise not only with regard to the objective characteristics and subjective intent of each crime, but also with regard to criteria relating to attempted crimes, acting as an accessory to a crime and various defence pleas or justifications. While IHL provides only limited guidance in this respect, the statutes and practice of the international courts and tribunals have significantly contributed to clarifying general questions of international criminal law. Thus, individuals are criminally responsible not only for committing or issuing orders to commit war crimes, but also for planning, preparing, or attempting to commit war crimes, and for instigating, assisting, facilitating, or otherwise aiding or abetting others in the commission of war crimes.<sup>1061</sup>

Individual responsibility for war crimes is not limited to criminal responsibility, but also includes personal civil liability for any resulting harm. Most notably, the International Criminal Court may “make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.”<sup>1062</sup> The Statutes of the ICTY and the ICTR restrict these tribunals to ordering the restitution of “any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owner.”<sup>1063</sup> However, claims for compensation may be filed within the framework of institutions and procedures established under national law.

### (b) Responsibility of superiors and commanders

International criminal law penalizes not only persons who actively commit war crimes or issue orders to that effect, but also covers crimes resulting from a failure to act as required by IHL.<sup>1064</sup> In particular, military commanders have an explicit personal duty to intervene in cases of ongoing or impending violations of IHL committed by persons acting under their

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ons, the Anti-Personnel Mine Ban Convention and the Convention on Cluster Munitions do not *per se* create international responsibility of individuals for war crimes; instead, they place an obligation on States to take measures to suppress violations of these conventions.

1059 ICTY Statute, Arts 2 and 3; ICTR Statute, Arts 4 and 5; SCSL Statute, Art. 1; Rome Statute, Arts 5, 8 and 25.

1060 CIHL, Rule 151.

1061 Rome Statute, Art. 25; ICTY Statute, Art. 7; ICTR Statute, Art. 6; SCSL Statute, Art. 6; CIHL, Rule 152.

1062 Rome Statute, Art. 75(2).

1063 ICTY Statute, Art. 24(3); ICTR Statute, Art. 23(3).

1064 AP I, Art. 86(1).



command and other persons under their control.<sup>1065</sup> The same duty is also implied for superiors other than military commanders, such as political leaders or representatives of civilian authorities. Thus, Additional Protocol I provides that an IHL violation committed by a subordinate does not absolve his or her superiors of penal or disciplinary responsibility, if “they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.”<sup>1066</sup>

In the field of international criminal law, the doctrine of command and superior responsibility was shaped by the international military tribunals that prosecuted military and political leaders for mass crimes committed during World War II. Building on the criteria established by these tribunals, the contemporary doctrine of command and superior responsibility rests on three cumulative elements, namely: (1) the existence of a *de facto* superior-subordinate relationship providing the superior with effective control over the conduct of the perpetrators; (2) the superior’s knowledge, or his or her culpable lack thereof, that a crime has been, or is about to be, committed; and (3) the superior’s failure to prevent, put an end to, or punish the crime.

In line with these elements, the Rome Statute provides that military commanders and other superiors are criminally responsible for war crimes committed by persons under their effective control if they have failed to take all necessary and reasonable measures within their power to prevent or repress such crimes or to submit the matter to the competent authorities for investigation and prosecution. In the case of military commanders, such criminal responsibility arises only if they “knew or, owing to the circumstances at the time, should have known” that their forces were committing or were about to commit war crimes and, in the case of other superiors, only if they “knew or consciously disregarded information clearly indicating” that their subordinates were committing or about to commit war crimes, and if these crimes concerned activities within their effective responsibility and control.<sup>1067</sup>

### (c) Superior orders

During the war crimes trials that took place after World War II, many defendants invoked superior orders as a defence, claiming that they could not be held accountable for the crimes committed. The case-law of these trials eventually resulted in the development of a customary rule applicable in all armed conflicts, whereby obeying a superior order does not relieve

<sup>1065</sup> AP I, Art. 87(1).

<sup>1066</sup> AP I, Article 86(2); CIHL, Rule 153.

<sup>1067</sup> Rome Statute, Art. 28.

a subordinate of criminal responsibility, if the subordinate knew that the act ordered was unlawful, or if he should have known so because of its manifestly unlawful nature.<sup>1068</sup> Where an order is manifestly unlawful, all combatants have a customary duty to disobey.<sup>1069</sup> In codifying this customary rule, the Rome Statute provides that persons who have committed a crime under the orders of a government or superior, whether military or civilian, shall not be relieved of their criminal responsibility unless: (a) they were under a legal obligation to obey; (b) they did not know that the order was unlawful; and (c) the order was not manifestly unlawful, such as would be the case, for example, for any order to commit genocide or crimes against humanity.<sup>1070</sup> Conceivably, superior orders may also become a valid defence plea for perpetrators in cases where disobedience is likely to entail individual or collective punishment involving summary execution or serious bodily harm.<sup>1071</sup> Finally, situations involving superior orders that do not relieve the perpetrator of criminal responsibility may still be taken into account in determining the gravity of his or her personal culpability, and the severity of the sanction to be imposed.

#### **(d) Irrelevance of combatant's privilege**

The combatant's privilege afforded by IHL to members of the armed forces of a party to an international armed conflict cannot serve as a defence plea in a war crimes trial. While the combatants' "right to participate directly in hostilities" entails immunity from prosecution for lawful acts of war that would otherwise constitute offences under the national law of the capturing State, they enjoy no such immunity for violations of IHL that are punishable under national or international criminal law.<sup>1072</sup>

#### **(e) Irrelevance of official capacity**

Any privileges or immunities attached to the official capacity of a head of State or government, a member of a government or parliament, an elected representative or a government official, cannot exempt such persons from international criminal responsibility, or provide grounds for reducing their sentence.<sup>1073</sup>

#### **(f) Mistake of fact or mistake of law**

Mistakes of fact or law may provide grounds for excluding criminal responsibility only if they negate the subjective intent (*mens rea*) required to

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1068 CIHL, Rule 155.

1069 CIHL, Rule 154.

1070 Rome Statute, Art. 33.

1071 Rome Statute, Art. 31(d).

1072 On the obligation of the detaining State to take repressive measures, see GC III, Art. 129(2) and (3).

1073 Rome Statute, Art. 27.

commit the crime.<sup>1074</sup> In other words, it is not the perpetrator's subjective knowledge of the *unlawfulness* of an act that is decisive, but his awareness of *the facts that make that act unlawful*. For example, soldiers disguising themselves as civilians in order to carry out a lethal surprise attack against an insurgent commander cannot claim a mistake of law because they erroneously believed that the treacherous killing of an enemy constitutes a war crime only in international armed conflict.<sup>1075</sup> Conversely, a sniper targeting a uniformed enemy cannot be held criminally responsible for the war crime of attacking civilians simply because the targeted person subsequently turns out to be a civilian wearing a military uniform.

### (g) Self-defence

Exceptionally, criminal responsibility for war crimes is excluded in situations of self-defence, namely where persons take reasonable action to defend themselves, others, or property essential to their survival or to the success of a military mission, against an imminent and unlawful use of force and in a manner proportionate to the danger. Conducting a defensive military operation cannot, in itself, justify a plea of self-defence or exclude criminal responsibility.<sup>1076</sup>

## 2. War crimes

Serious violations of IHL are considered war crimes punishable under international criminal law.<sup>1077</sup> This essentially includes any violations described as “grave breaches” of the 1949 Geneva Conventions and Additional Protocol I, and other serious violations of IHL recognized as war crimes in the Rome Statute<sup>1078</sup> or in customary law.<sup>1079</sup> In substantive terms, the extensive lists of war crimes provided by the 1949 Geneva Conventions, Additional Protocol I and the Rome Statute essentially comprise violations of the core protection afforded either to persons and objects in the power of the enemy or to persons and objects protected against attack in the conduct of hostilities.

For persons and objects in the power of a belligerent party, this includes crimes such as murder, torture and other forms of inhuman treatment, including sexual violence, pillage and wanton destruction, hostage-taking, unlawful imprisonment and the denial of a fair trial, as well as forced recruitment into hostile armed forces, child recruitment and unlawful deportations and transfers. During the conduct of hostilities, this includes, most notably,

<sup>1074</sup> Rome Statute, Art. 32.

<sup>1075</sup> Rome Statute, Art. 8(2)(e)(ix).

<sup>1076</sup> Rome Statute, Art. 31(c).

<sup>1077</sup> CIHL, Rule 156.

<sup>1078</sup> See GC I, Art. 50; GC II, Art. 51; GC III, Art. 130; GC IV, Art. 147; AP I, Art. 85; Rome Statute, Art. 8(2)(a) and (b).

<sup>1079</sup> For the definition of war crimes in customary IHL, see CIHL, Rule 156.

the deliberate violation of the principles of distinction and of proportionality, and of the prohibitions against perfidy and denial of quarter, and the use of certain prohibited weapons.<sup>1080</sup> For each war crime, a number of objective (factual, or *actus reus*) and subjective (mental, or *mens rea*) criteria must be met for the deed to be punishable under international law. For crimes listed in the Rome Statute, these elements have been authoritatively identified in the Elements of Crimes adopted by the States party to the Statute.<sup>1081</sup>

The international criminalization of serious violations of IHL does not necessarily require a legal basis in treaty law, but can also arise as a matter of international custom. This was demonstrated by the Nuremberg trials in 1945–1946 with regard to international armed conflict, and by the case-law of the ICTY and the ICTR in connection with non-international armed conflict. International crimes include not only war crimes, but also crimes against humanity, genocide and, in the future, the crime of aggression.<sup>1082</sup> These international crimes should not be confused with acts that States party to certain treaties are obliged to criminalize under their domestic legislation, but which are not covered by international criminal law. For example, the Convention against Torture does not criminalize torture as a matter of international law, but obliges States Parties to criminalize torture (including attempted torture, complicity and participation) under national law.<sup>1083</sup> Hence, torture committed for reasons related to an armed conflict constitutes a war crime, and torture committed as part of a widespread or systematic attack directed against any civilian population amounts to a crime against humanity<sup>1084</sup> or, in certain circumstances, to genocide.<sup>1085</sup> Torture committed in other situations still constitutes a grave violation of human rights law, and must be prosecuted by States under national legislation. However, it cannot be adjudicated by the International Criminal Court as an international crime.

### 3. Duty of States to investigate and prosecute or extradite

As a matter of treaty IHL, States party to the 1949 Geneva Conventions and Additional Protocol I are required to search for persons alleged to have

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1080 AP I, Art. 85(3) and (4).

1081 Rome Statute, Art. 9; Elements of Crimes, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court*, First session, New York, 3–10 September 2002, part II. B. For the Elements of Crimes adopted at the 2010 Review Conference, see *Official Records of the Review Conference of the Rome Statute of the International Criminal Court*, Kampala, 31 May–11 June 2010.

1082 Rome Statute, Arts 6, 7 and (in force soon) 8 *bis*.

1083 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 (Convention against Torture), Art. 4(1).

1084 Rome Statute, Art. 7(1)(f).

1085 Rome Statute, Art. 6(b).

committed, or to have ordered to be committed, crimes categorized as “grave breaches” of these treaties, and to bring such persons, regardless of their nationality, before their own courts. Alternatively, and always in accordance with the relevant principles of national and international law, States may extradite such suspects for trial to another State, made out a *prima facie* case.<sup>1086</sup> States must also take the “measures necessary” for the suppression of all other violations of the Conventions and of Additional Protocol I,<sup>1087</sup> including those resulting from a failure to act when under a duty to do so.<sup>1088</sup> The use of the expression “shall take measures necessary for the suppression of all acts contrary to the Convention” implies that States may take a wide range of measures to ensure that violations of the Conventions are stopped and that measures are taken to prevent their recurrence.<sup>1089</sup> In practice, this requires States to ensure that even violations of IHL not classed as war crimes can and will be prosecuted under national law, thus emphasizing the importance of domestic courts to the national implementation of IHL.

Moreover, as a matter of customary international law, States have the right to establish, for their national courts, universal jurisdiction over all war crimes, including those not categorized as “grave breaches” of the 1949 Geneva Conventions and Additional Protocol I.<sup>1090</sup> States have a duty to investigate all war crimes over which they have established jurisdiction – at least all crimes allegedly committed by their nationals or armed forces, or on their territory – and, if appropriate, to initiate prosecutions.<sup>1091</sup> In no case may national statutes of limitation apply to war crimes.<sup>1092</sup> It goes without saying that persons accused of war crimes or crimes against humanity must benefit from the same fundamental guarantees as any other person deprived of his or her liberty, and should be prosecuted in accordance with the applicable rules of national and international law.<sup>1093</sup> States must, subject to other relevant treaties concerning international cooperation in criminal proceedings, provide each other with the greatest possible assistance and, where required, cooperate with the UN to facilitate the investigation and prosecution of war crimes, including grave breaches.<sup>1094</sup> Finally, in addition to the 1949 Geneva Conventions and Additional Protocol I, a number of other treaties that may

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1086 GC I, Art. 49(2); GC II, Art. 50(2); GC III, Art. 129(2); GC IV, Art. 146(2).

1087 GC I, Art. 49(3); GC II, Art. 50(3); GC III, Art. 129(3); GC IV, Art. 146(3); AP I, Art. 85.

1088 GC I, Art. 49(3); GC II, Art. 50(3); GC III, Art. 129(3); GC IV, Art. 146(3); AP I, Arts 85 and 86(1).

1089 ICRC, *Commentary on the First Geneva Convention*, 2nd ed., 2016, *op. cit.* (note 64), Art. 49.

1090 CIHL, Rule 157.

1091 CIHL, Rule 158.

1092 Rome Statute, Art. 29; CIHL, Rule 160.

1093 AP I, Art. 75(7).

1094 AP I, Arts 88(1) and (3), and 89; CIHL, Rule 161.

apply in armed conflicts require States Parties to establish universal jurisdiction over certain crimes.<sup>1095</sup>

### To go further (Individual criminal responsibility for violations of IHL)<sup>1096</sup>

- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, [Chapter 13: Criminal repression](#), pp. 395–426.
- Knut Dörmann, *Elements of War Crimes under the Statute of the International Criminal Court*, Cambridge University Press, Cambridge, 2002.
- Héctor Olasolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes*, Hart Publishers, Oxford, 2009, 354 pp.
- Jamie Allan Williamson, “[Some considerations on command responsibility and criminal liability](#),” *IRRC*, Vol. 90, No. 870, June 2008, pp. 303–317.
- Marko Divac Öberg, “[The absorption of grave breaches into war crimes law](#),” *IRRC*, Vol. 91, No. 873, March 2009, pp. 163–183.
- Paola Gaeta, “The defense of superior order: The Statute of the International Criminal Court versus customary international law,” *European Journal of International Law*, Vol. 10, 1999, pp. 172–191.
- ICRC, [Preventing and Repressing International Crimes: Towards an “Integrated” Approach Based in Domestic Practice](#), ICRC, Geneva, 2014, 116 pp.

<sup>1095</sup> See, in particular, Convention against Torture, Art. 5; Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, Art. 10; Inter-American Convention on Forced Disappearance of Persons, 9 June 1994, Art. 4; Second Protocol to the Hague Convention on Cultural Property, Art. 16(1).

<sup>1096</sup> All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

### *How Does Law Protect in War?*

- Case No. 68, [Belgium, Law on Universal Jurisdiction](#)
- Document No. 96, [United States Military Tribunal at Nuremberg, \*United States v. Wilhelm List\*](#)
- Case No. 102, [United States, In re Yamashita](#)
- Case No. 117, [United States, \*United States v. William L. Calley, Jr.\*](#)
- Case No. 211, [ICTY, \*The Prosecutor v. Tadic \(Part A, paras 79–84\)\*](#)
- Case No. 233, [Luxembourg, Law on Cooperation with the International Criminal Courts](#)

## VI. JUDICIAL ENFORCEMENT

Whenever possible, violations of IHL should be prosecuted and adjudicated through national institutions and procedures, with international mechanisms generally playing a subsidiary and complementary role, activated only in cases where national accountability mechanisms fail to function effectively. In certain States affected by conflict, such as Israel, Colombia or the United States, national courts have played an important role in interpreting and implementing IHL, whereas in other States, the enforcement of IHL through national courts has proved more difficult. At the international level, several judicial bodies are capable of adjudicating cases involving violations of IHL, each from a different perspective.

### 1. International Court of Justice

The ICJ, as the principal UN judicial body, contributes to the implementation and enforcement of IHL through its decisions on contentious cases and its advisory opinions. Disputes between States involving alleged violations of IHL may be examined by the ICJ, if the States involved have agreed to submit to its jurisdiction, whether on an ad hoc basis for a specific case, or through an optional declaration accepting its jurisdiction for future cases.<sup>1097</sup> Important, contentious cases involving violations of IHL adjudicated by the ICJ have included the *Nicaragua Case* (1986)<sup>1098</sup> and the *Congo Case* (2005).<sup>1099</sup> Moreover, on the request of the UN General Assembly, the Security Council and other authorized UN bodies and agencies, the ICJ may issue advisory opinions

<sup>1097</sup> ICJ Statute, Art. 36(2).

<sup>1098</sup> ICJ, *Nicaragua case*, *op. cit.* (note 27).

<sup>1099</sup> ICJ, *DRC v. Uganda*, *op. cit.* (note 81).

on the legality under IHL of certain aspects of the conduct of States.<sup>1100</sup> Thus, the ICJ has issued advisory opinions on the “legality of the threat or use of nuclear weapons” (1996)<sup>1101</sup> and on the “legal consequences of the construction of a wall in the occupied Palestinian territory” (2004).<sup>1102</sup> When examining a case or issuing an opinion on a matter linked to an armed conflict, the ICJ quite naturally applies IHL because, unlike many other international judicial bodies, it is not bound to apply only one particular treaty, but is free to refer to all applicable international law, whatever its source, as long as it is relevant to the dispute and binding on all the parties involved.<sup>1103</sup>

## 2. International human rights bodies

Depending on the type of IHL violation concerned, individual victims may bring individual complaints, including reparation claims, before the judicial and quasi-judicial implementing bodies of universal and regional human rights treaties. From an enforcement perspective, it is important to remember that the *lex specialis* character of IHL does not suspend the applicability of human rights law, but merely determines its interpretation during armed conflicts.<sup>1104</sup> Consequently, violations of IHL that also violate human rights law may be pursued through the individual complaints procedures provided under the relevant human rights treaties. For example, the ECHR has adjudicated several human rights cases concerning not only occupied territories, but also combat operations, including attacks by military aircraft in non-international armed conflicts.<sup>1105</sup> In many cases, however, the question of jurisdiction is likely to be problematic, particularly in the case of extraterritorial aerial operations involving no territorial control.<sup>1106</sup> Thus, the various judicial institutions complement rather than compete with each other. Moreover, the Inter-American Commission on Human Rights (IACHR) has not hesitated to refer to IHL where necessary for the application and interpretation of the American Convention on Human Rights in situations of armed conflict.<sup>1107</sup>

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1100 UN Charter, Art. 96.

1101 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 38).

1102 ICJ, *The Wall Opinion*, *op. cit.* (note 36).

1103 ICJ Statute, Article 38(1).

1104 On the *lex specialis* principle, see Chapter 1.III.2.

1105 ECHR, *Cyprus v. Turkey*, Merits, App. No. 25781/94, 20 May 2001; ECHR, *Al-Skeini and others v. UK*, App. No. 55721/07, 7 July 2011; ECHR, *Isayeva, Yusopova and Bazayeva v. Russia*, App. No. 57947/00, 57948/00 and 57949/00, 24 February 2005; ECHR, *Issa et al. v. Turkey*, App. No. 31821/96, 16 November 2004.

1106 ECHR, *Bankovic and others v. Belgium and 16 other Contracting States*, App. No. 52207/99, 12 December 2001.

1107 See, e.g., IACHR, *Caracoles Community Resolution*, 8 March 1982, consideration 5 in conjunction with Resolution 2; IACHR, *La Tablada case*, *op. cit.* (note 37), paras 158 and 195; IACHR, *Report on the Massacre of the Jesuits in El Salvador*, Report No. 136/99, Case 10. 488, para. 237.



While the continued applicability of human rights law during armed conflicts can hardly be disputed as a matter of law,<sup>1108</sup> the growing trend to examine the conduct of belligerent parties through human rights mechanisms is not entirely unproblematic, not least because the human rights obligations under the purview of these mechanisms are binding only on States. Most contemporary armed conflicts, however, are non-international, and by definition involve at least one non-State party. Examining armed conflicts through human rights mechanisms means that only the conduct of the States involved can be adjudicated, whereas any violations of IHL committed by non-State armed groups will avoid such scrutiny and must be dealt with in different fora. This lack of equality certainly does nothing to overcome the traditional reluctance of States to accept any mandatory form of judicial supervision of their military operations in armed conflicts. It must also be emphasized that IHL is not just the “human rights law of armed conflicts,” as it protects not only human beings, but also civilian and cultural property, the environment and, to a certain extent, the continuity of the political order of States. Thus, many forms of conduct that constitute flagrant violations of IHL do not fall within the purview of human rights mechanisms, and therefore cannot be adjudicated by them.

Overall, the increasing involvement of judicial and quasi-judicial human rights mechanisms in examining and adjudicating human rights abuses committed by belligerent States certainly has, in spite of various obstacles and limitations, significantly contributed to renewing the international community’s interest in IHL, and to the improved implementation and enforcement of this body of law in contemporary situations of armed conflict.

### **3. International criminal courts and tribunals**

The case-law of international criminal courts and tribunals has played a decisive role in shaping the contemporary interpretation and application of IHL. From the International Military Tribunals at Nuremberg and Tokyo after World War II to the ad hoc Tribunals for the former Yugoslavia and Rwanda, the international prosecution and adjudication of suspected war criminals has required the development of an extremely broad range of detailed, yet practice-oriented and realistic criteria for determining the margins of lawful conduct in armed conflict.

In 1998, these developments culminated in the establishment of the International Criminal Court.<sup>1109</sup> The Court is currently the only permanent

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<sup>1108</sup> On IHL and human rights law, see Chapter 1.III.2.

<sup>1109</sup> The Rome Statute was adopted on 17 July 1998 and entered into force on 1 July 2002, after 60 States had become party thereto. As of 1 November 2014, 122 States were party to the Rome Statute.

international judicial body specifically mandated to prosecute violations of IHL. Within the scope of its jurisdiction, the Court examines allegations of war crimes, crimes against humanity, genocide and, from 2017, the crime of aggression. The Court may exercise its jurisdiction in three situations: if the accused is a national of a State party to the Rome Statute; if the alleged crime took place on the territory of a State Party (including registered vessels or aircraft); or if a case is referred to the Court by the UN Security Council.<sup>1110</sup> Moreover, the Court's jurisdiction is subsidiary to that of national courts, and may be exercised only when national courts are unwilling or unable to assume their primary responsibility to investigate or prosecute.<sup>1111</sup> In order to ensure the primacy of their national jurisdiction, many States party to the Rome Statute have introduced domestic legislation that gives national courts jurisdiction over the crimes listed in the Statute.

A number of ad hoc tribunals and special courts have also been established to examine allegations of international crimes in specific contexts. In addition to the International Criminal Tribunals for the former Yugoslavia (1993) and Rwanda (1994), established by the UN Security Council, these institutions include the Special Court for Sierra Leone (2002) and the Extraordinary Chambers in the Courts of Cambodia (2003), both of which were established by treaties signed between the UN and the relevant governments as “hybrid” institutions, prosecuting serious crimes, under both international and domestic law, allegedly committed during the conflict in Sierra Leone and Pol Pot's regime in Cambodia. Additionally, special panels or chambers within existing national tribunals have also been created pursuant to national legislation, such as the War Crimes Chamber in Bosnia and Herzegovina (2002) and the Special Panels for Serious Crimes in Timor-Leste (2000).

In spite of the International Criminal Court's comprehensive mandate and jurisdiction, its practical impact remains limited by the fact that several major military powers, including the United States, the Russian Federation and China, have yet to become party to the Rome Statute. The Court faces a number of challenges, including accusations of bias for prosecuting only leaders from less influential African States, while ignoring crimes committed by representatives of richer and more powerful States. Moreover, both the ad hoc tribunals and the International Criminal Court face challenges relating to budgets, the speed of their work and geographic distance from the contexts under examination. These problems highlight the limitations of international criminal prosecution as a mechanism for the comprehensive adjudication of violations of IHL. The fact of the matter is that relations between States continue to be based on the concept

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<sup>1110</sup> Rome Statute, Arts 12 and 13.

<sup>1111</sup> Rome Statute, Arts 17 and 20.

of national sovereignty and on an uneven distribution of political and military power. Moreover, the widespread violence, destruction and destabilization that accompany most armed conflicts make it difficult to conduct the independent and reliable investigations required for criminal trials. Furthermore, in terms of quantitative capacity, international judicial bodies will always be limited to adjudicating a small number of major cases, whereas the vast majority of allegations will have to be dealt with by local courts, or through extrajudicial mechanisms that aim to provide justice and reconciliation.

The successful prosecution of war criminals by international courts and tribunals has served as a powerful deterrent, and strengthened respect for and compliance with IHL.

### **To go further (Judicial enforcement)<sup>1112</sup>**

- Yusuf Aksar, *Implementing International Humanitarian Law: From the Ad-Hoc Tribunals to a Permanent International Criminal Court*, Routledge, London/New York, 2004, 314 pp.
- Cordula Droege, “[Elective affinities? Human rights and humanitarian law](#),” *IRRC*, Vol. 90, No. 871, September 2008, pp. 501–548.
- Vincent Chetail, “[The contribution of the International Court of Justice to international humanitarian law](#),” *IRRC*, Vol. 85, No. 850, June 2003, pp. 235–269.
- “[International criminal tribunals](#),” *IRRC*, Vol. 88, No. 861, March 2006.

### ***How does Law Protect in War?***

- Case No. 23, [The International Criminal Court](#)
- Case No. 62, [ICJ, Nuclear Weapons Advisory Opinion](#)
- Case No. 165, [Sudan, Arrest Warrant for Omar Al-Bashir](#)
- Case No. 230, [UN, Statute of the ICTR](#)
- Case No. 192, [Inter-American Commission on Human Right, Tablada](#)
- Case No. 236, [ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo](#)
- Case No. 282, [ECHR, Isayeva v. Russia](#)

1112 All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

## VII. NON-JUDICIAL ENFORCEMENT

As shown above, international judicial mechanisms face a number of challenges. Consequently, enforcement of IHL is still largely dependent on more traditional, alternative monitoring, complaint and implementation mechanisms. In practice, when one belligerent State violates IHL, the injured State is likely to first issue a formal protest and call for an end to the unlawful conduct. Of course, the injured State may also demand that other States cease or abstain from assisting the incriminated State in its unlawful conduct. Secondly, the injured State may request one or several other States to exert their influence on the incriminated State, or to provide their good offices, for example by agreeing to serve as a Protecting Power. With the agreement of the incriminated State, it may also initiate an official conciliation or enquiry procedure, or activate the International Humanitarian Fact-Finding Commission. In the worst case scenario, the injured State may resort to limited self-help measures, most notably in the form of belligerent reprisals. Finally, the ICRC and other humanitarian organizations have a right of humanitarian initiative to assist victims of armed conflicts.

### 1. Protecting Powers and their substitutes

At the outset of any international armed conflict, belligerent States are obliged to designate Protecting Powers, and to apply the 1949 Geneva Conventions “with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict.”<sup>1113</sup> The diplomatic institution of the Protecting Powers is not exclusive to situations of armed conflict, but has developed over centuries to enable a State, through its good offices and in a wide variety of situations, to safeguard the interests of another State vis-à-vis a third State. In international armed conflicts, Protecting Powers are neutral or otherwise non-belligerent States that are mandated by one belligerent State, with the consent of an enemy State, to protect its interests and those of its nationals vis-à-vis that enemy State.<sup>1114</sup> The Parties may also agree to entrust the duties of a Protecting Power to “an organization which offers all guarantees of impartiality and efficacy.”<sup>1115</sup> Given that normal diplomatic relations between warring States tend to break down for the duration of the armed conflict, Protecting Powers have the task of maintaining diplomatic communication channels between the adversaries. Protecting Powers are also entitled to monitor the

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<sup>1113</sup> GC I–III, Arts 8–10; GC IV, Arts 9–11; AP I, Art. 5.

<sup>1114</sup> AP I, Art. 2(c).

<sup>1115</sup> GC I–III, Art. 10; GC IV, Art. 11.

compliance of belligerent States with IHL, and to provide protection and humanitarian relief to both military and civilian victims.<sup>1116</sup>

During World War II, neutral States such as Switzerland and Sweden assumed numerous mandates to serve as Protecting Powers for Allied States and for States belonging to the Axis. However, during the Cold War, the increasingly polarized political landscape and the predominance of non-international proxy wars prevented frequent recourse to the services of Protecting Powers. In practice, therefore, many of the wide-ranging functions assigned to the Protecting Powers in armed conflicts were gradually taken over by the ICRC, acting on the basis of its recognized right of humanitarian initiative. Even the specifically diplomatic functions of the Protecting Powers not assumed by the ICRC have become less vital today, given that alternative fora exist to ensure adequate communication between belligerent States, most notably within the framework of the UN and regional organizations. Overall, therefore, although the system of Protecting Powers continues to exist in other contexts, it is rarely used in situations of armed conflict, and is unlikely to experience a significant revival in the future as an IHL implementation mechanism.<sup>1117</sup>

## 2. Conciliation procedure

Whilst it is not, strictly speaking, an enforcement mechanism, the “conciliation procedure” aims to resolve disagreements between belligerents regarding the interpretation and application of the 1949 Geneva Conventions. The procedure may be initiated by the Protecting Powers themselves, “where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions” of the Conventions.<sup>1118</sup> For this purpose, any Protecting Power may propose and facilitate a meeting between representatives of the belligerent parties, with a view to resolving the disagreement in question. While the conciliation procedure already existed under the 1929 Geneva Conventions, the right of initiative and humanitarian role of the Protecting Powers were strengthened in the 1949

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1116 See, for example, the right of prisoners of war and civilians to make direct applications to the Protecting Powers (GC III, Art. 78(1); GC IV, Art. 30).

1117 For example, at one point, Switzerland held six mandates as a Protecting Power, none of which involved a situation of armed conflict (United States-Cuba/Cuba-United States; Russian Federation-Georgia/Georgia-Russian Federation; United States-Islamic Republic of Iran; Islamic Republic of Iran-Egypt). See <https://www.eda.admin.ch/eda/en/home/aussenpolitik/menschenrechte-menschliche-sicherheit/frieden/schutzmachtmandate.html> These examples are based on the Vienna Convention on Diplomatic Relations, 18 April 1961, and are not *per se* examples of Protecting Powers under the 1949 Geneva Conventions.

1118 GC I–III, Art. 11; GC IV, Art. 12.

Geneva Conventions, particularly by an explicit reference to the interests not only of the belligerent parties, but of the protected persons themselves. In practice, however, the conciliation procedure has never been invoked and has now been largely replaced by the emergence of alternative fora to facilitate dialogue between belligerent States, particularly within the framework of the UN and regional organizations.<sup>1119</sup>

### 3. Enquiry procedure

Although national authorities bear primary responsibility for investigating alleged IHL violations, they often lack either the will or the capacity to take the required action, or their findings are unlikely to be accepted by their adversary or the international community. The 1949 Geneva Conventions therefore propose that, at the request of a belligerent State, an “enquiry procedure” should be launched to investigate alleged violations of IHL.<sup>1120</sup> If the enquiry concludes that a violation of the Conventions has occurred, the parties are obliged to put an end to that violation and to punish the perpetrators with the least possible delay. The main problem is that the Conventions fail to provide even a basic outline of this mechanism, leaving it to the belligerent parties to set out the procedural details once hostilities have broken out and all peaceful means of settling their disputes have manifestly failed. It is not surprising, therefore, that the enquiry procedure has never been invoked in practice.<sup>1121</sup> The alternative solution proposed in the Conventions, namely to appoint an umpire to decide on the procedure to be followed, also requires consensus and is therefore unlikely to succeed once an armed conflict is under way.

### 4. International Humanitarian Fact-Finding Commission

Given that the enquiry procedure had never been implemented since its inception in 1929, the provisions of Additional Protocol I aimed to take this idea one step further by establishing an International Humanitarian Fact-Finding Commission on a permanent basis.<sup>1122</sup> Thus, States may declare at any time, and for any future armed conflict, that they recognize the competence of the Commission to investigate alleged IHL violations *ipso facto* – i.e. without special agreement – in relation to any other State accepting the same obligation. In making such a declaration, States recognize the Commission’s competence to: (i) enquire into any facts alleged to be a grave breach or other serious violation of the Conventions or

1119 See ICRC, *Commentary on the First Geneva Convention*, 2nd ed., 2016, *op. cit.* (note 64), Art. 11.

1120 GC I, Art. 52; GC II, Art. 53; GC III, Art. 132; GC IV, Art. 149.

1121 See ICRC, *Commentary on the First Geneva Convention*, 2nd ed., 2016, *op. cit.* (note 64), Art. 52.

1122 AP I, Art. 90.

Additional Protocol I; (ii) through its good offices, facilitate the restoration of an attitude of respect for IHL. However, in the absence of this prior declaration, the Commission may conduct an enquiry only at the request of one belligerent party and with the consent of the other. While the Commission's mandate is limited to international armed conflicts, it has unilaterally declared that, if requested to do so by all belligerents involved, it would be prepared to assume the same tasks in non-international armed conflicts.<sup>1123</sup> The Commission's competence is limited to fact-finding; it may not draw any conclusions relating to the international lawfulness of established facts, or make its findings public without the consent of all belligerents concerned. Of course, once the facts of a case are established, determining the legal consequences relating to those facts is often relatively straightforward. This may be one of the reasons why, to date, no belligerent party has ever agreed to rely on the Commission's services. Despite their reluctance to use the Commission, States have on various occasions emphasized its potential to improve respect for IHL in ongoing armed conflicts. Most notably, a significant number of States participating in informal meetings convened by the ICRC and Switzerland, from 2012 to 2014, have reiterated their interest in examining how the Commission could be incorporated in a future IHL compliance system.

### To go further (Non-judicial enforcement)<sup>1124</sup>

- Swiss Federal Department of Foreign Affairs, *Third Meeting of States on Strengthening Compliance with International Humanitarian Law*, Geneva, 30 June–1 July 2014, Chairs' Conclusions, p. 5. Available at: <https://www.icrc.org/eng/assets/files/2014/third-meeting-of-states-2014-background-document.pdf>

### How does Law Protect in War?

- Document No. 33, [The International Humanitarian Fact-Finding Commission](#)
- Document No. 86, [Switzerland Acting as Protecting Power in World War II](#)
- Case No. 95, [United States Military Tribunal at Nuremberg, The Ministries Case](#)

## 5. Belligerent reprisals

Throughout the history of international law, reprisals have constituted one of the most effective tools for States to ensure that other States respect their international obligations. Reprisals are a coercive self-help measure whereby

<sup>1123</sup> See *Report of the International Fact-Finding Commission 1991–1996*, p. 2 and *Report on the Work of the IHFFC on the Occasion of its 20th Anniversary*, Bern, 2011, pp. 15, 17, 19 and 28. Available at: [http://www.ihffc.org/index.asp?page=public\\_reports&listfilter=off](http://www.ihffc.org/index.asp?page=public_reports&listfilter=off)

<sup>1124</sup> All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

a State aims to compel another State to cease violating international law through acts that would otherwise be contrary to international law. In IHL, reprisals are permissible only in exceptional circumstances and on strict conditions. This singularity of IHL is rooted in the fact that the main beneficiaries of IHL are not the belligerent States themselves, but the potential victims of any armed conflict between these States.

Thus, treaty IHL prohibits belligerent reprisals not only against civilians,<sup>1125</sup> during the conduct of hostilities but also against persons in the power of a party to a conflict, including the wounded, the sick, the shipwrecked, medical and religious personnel, captured combatants, civilians in occupied territory and other categories of civilian in the power of a belligerent party.<sup>1126</sup> Moreover, treaty IHL prohibits reprisals against the property of civilians in the power of an adversary, medical objects, cultural property, objects indispensable to the survival of the civilian population, the natural environment, and works and installations containing dangerous forces in particular, as well as civilian objects in general.<sup>1127</sup>

While treaty law does not currently explicitly prohibit belligerent reprisals as a means of enforcing compliance with prohibitions and restrictions on the use of certain weapons, recent State practice reflects a trend towards outlawing belligerent reprisals altogether.<sup>1128</sup>

Where not prohibited by IHL, belligerent reprisals are subject to the following strict conditions under general international law:<sup>1129</sup>

- **Purpose:** Reprisals may be taken only in response to a serious violation of IHL, and only to induce an adversary to comply with the law. This excludes the permissibility of “anticipatory” reprisals, “counter-reprisals,” reprisals in reaction to a violation of another type of law, and reprisals for the purpose of revenge or punishment.<sup>1130</sup>
- **Measure of last resort (necessity):** Before resorting to belligerent reprisals, protests, negotiations or other lawful measures must be used to try to induce an adversary to cease to violate IHL. Re-

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1125 AP I, Art. 51(6); Protocol II to the Convention on Certain Conventional Weapons, Art. 3(2); Amended Protocol II to the Convention on Certain Conventional Weapons, Art. 3(7).

1126 GC I, Art. 46; GC II, Art. 47; GC III, Art. 13(3); GC IV, Art. 33(1); CIHL, Rule 146.

1127 GC I, Art. 46; GC II, Art. 47; GC IV, Art. 33; AP I, Arts 52–56; Hague Convention on Cultural Property, Art. 4(4). See also CIHL, Rule 147.

1128 CIHL, commentary on Rule 145.

1129 CIHL, Rule 145.

1130 Draft Articles, *op. cit.* (note 1038), Art. 49.





C. Von Troggenburg/ICRC

San José del Guaviare, Colombia, 2010. Men from the forest infantry battalion commanded by General José Joaquín Ricaurte attend an IHL dissemination session.

prisals may serve only as a measure of last resort, after warnings have gone unheeded.

- **Proportionality:** Reprisals must be proportionate to the original IHL violation to which they respond.
- **Decision at the highest level of government (authority):** The decision to resort to reprisals must be taken at the highest level of government or, arguably, by the military leadership. In no case may decisions to launch belligerent reprisals be taken by individual combatants.
- **Termination:** Belligerent reprisals must be discontinued as soon as the enemy ceases its violation of IHL.<sup>1131</sup>

The extensive range of prohibitions and strict conditions imposed on belligerent reprisals has significantly restricted the use of this instrument in contemporary armed conflicts. For certain States, the restrictive regime of Additional Protocol I was a reason not to ratify the treaty, while others have made reservations to the relevant provisions. In general, given that belligerent reprisals carry a considerable risk of abuse and counter-reprisal, all of which may exacerbate the conflict, there is a continuing trend towards their general prohibition as a means of enforcing compliance with IHL.

<sup>1131</sup> Draft Articles, *op. cit.* (note 1038), Art. 53.

## 6. Role of humanitarian and non-governmental organizations

IHL provides humanitarian organizations, such as the ICRC and the National Societies, with a right to offer their services for the benefit of victims of armed conflict.<sup>1132</sup> In practice, this right translates into a range of humanitarian services and activities to provide persons affected by such situations with the assistance, support and protection they are entitled to under IHL.<sup>1133</sup> The right to offer services may also be exercised by any impartial humanitarian or non-governmental organization capable of responding to humanitarian needs arising in situations of armed conflict, such as Médecins Sans Frontières, a well-known non-governmental organization specializing in providing medical and humanitarian relief. However, the ICRC's right of initiative extends further, enabling it "to make any proposal it deems to be in the interest of the victims of the conflict."<sup>1134</sup> Pursuant to that right, the ICRC has been granted observer status at the UN, where it can share its positions on various humanitarian issues and take part in various expert processes to address them.<sup>1135</sup> Other organizations are also active in the field of non-judicial enforcement, but adopt a different approach. For example, Amnesty International, Human Rights Watch and Human Rights First focus on ensuring respect for IHL and human rights law by denouncing violations. The reports produced by such human rights organizations increasingly also address questions of IHL and, through their impact on public opinion, may significantly influence its implementation and enforcement in a manner that complements the strictly confidential approach of the ICRC.

→ On the special role of the ICRC with regard to IHL, see Chapter 8.

## VIII. SPECIFIC ISSUES ARISING IN NON-INTERNATIONAL ARMED CONFLICTS

### 1. Obligation to respect and ensure respect for IHL

The duty of States to ensure respect for the Conventions in all circumstances also applies in non-international armed conflicts and obliges not only States involved in such conflicts, including the "territorial State", on whose territory the conflict is taking place, but also third States. Therefore, appeals or other peaceful measures taken by non-belligerent States to ensure respect for IHL in non-international armed conflicts may no longer be regarded as

1132 GC I–III, Art. 9; GC IV, Art. 10; AP I, Art. 81; GC I–IV, Art. 3(2); AP II, Art. 18(1).

1133 See Chapter 8.II.

1134 Christian Koenig, "[The ICRC is granted observer status at the United Nations](#)" *IRRC*, No. 279, December 1990.

1135 For example, the Guiding Principles on Internal Displacement. For more information on the general right of humanitarian initiative, see Chapter 8.II.6.

prohibited interference in the territorial State's internal affairs. The same principle also prohibits third States from supporting parties to a non-international armed conflict in committing IHL violations. Moreover, IHL governing non-international armed conflicts is binding not only on belligerent States, but on "each Party to the conflict," which means that non-State armed groups, too, must respect IHL and prevent violations by their members.<sup>1136</sup>

## 2. Legal status and capacity of non-State armed groups

The fact that treaty IHL creates direct obligations for non-State parties to a conflict does not affect their legal status under international law.<sup>1137</sup> In essence, this means that contracting States are prepared to impose humanitarian obligations on non-State actor and to respect those obligations in armed conflicts with such groups. However, they are not prepared to afford armed groups the international legal status and legitimacy that, for example, a traditional "recognition of belligerency" would entail. There has been some controversy as to the legal personality of non-State armed groups and the precise legal basis for their direct obligations under international law. The most widely accepted explanation is that States, in line with their right and duty to ensure respect for IHL within their sovereign sphere of influence, may impose the prohibitions and obligations necessary for this purpose on any citizen or non-State actor within their jurisdiction. Outside their own territory, however, States may impose obligations only on their own military personnel or civilian representatives, whereas the right to regulate the conduct of non-State armed groups falls to the territorial State. Thus, the applicability of treaty provisions regulating the rights and duties of non-State armed groups is generally limited to the territory of the contracting States.<sup>1138</sup> Admittedly, this approach does not resolve all questions arising in connection with the rights and duties of non-State armed groups under IHL. For example, if organized armed groups are obliged to respect IHL, what are the legal consequences of violations committed by them, in terms of their legal responsibility and duty to provide reparations? How can such groups criminalize, prosecute and punish violations of IHL in accordance with the principles of a fair trial, if they lack the right to legislate, as well as the capacity to conduct court proceedings and operate detention facilities that meet the requirements of IHL?

## 3. Lack of formal implementation mechanisms

Owing to the reluctance of States to afford non-State armed groups any degree of legitimacy, neither common Article 3 nor Additional

1136 GC I–IV, common Art. 3.

1137 GC I–IV, common Art. 3(4).

1138 See the territorial references in GC I–IV, common Art. 3, and API II, Art. 1(1).

Protocol II provides for Protecting Powers, enquiry procedures, fact-finding commissions or other international implementation mechanisms. In fact, customary IHL generally prohibits parties to non-international armed conflicts from resorting to belligerent reprisals, and from directing any other countermeasures against persons not, or no longer, taking a direct part in hostilities.<sup>1139</sup> Only a general duty to disseminate IHL may be derived directly from treaty IHL.<sup>1140</sup> In reality, the enforcement of IHL in non-international armed conflicts still largely depends on domestic law enforcement mechanisms and international supervision based on the right of humanitarian initiative, as enshrined in common Article 3.

#### 4. Individual criminal responsibility

IHL governing non-international armed conflict stipulates that, after the end of hostilities, the broadest possible amnesty should be granted to persons who have participated in the conflict or those deprived of their liberty for reasons related to the conflict, albeit with the exception of persons suspected of, accused of or sentenced for war crimes.<sup>1141</sup> The concept of war crimes applicable to non-international armed conflicts includes serious violations of common Article 3, of Additional Protocol II and of customary IHL.<sup>1142</sup> The principle of individual criminal responsibility for serious violations of IHL was first extended to non-international armed conflicts in the jurisprudence of the ICTY.<sup>1143</sup> It has since been incorporated in the provision on war crimes contained in the Rome Statute<sup>1144</sup> and is today recognized as part of customary IHL.<sup>1145</sup>

#### 5. Special agreements and unilateral declarations

As far as humanitarian consequences are concerned, there are no fundamental differences between international and non-international armed conflicts. In both types of armed conflict, the conduct of hostilities causes death and injury among military personnel and civilians, and the destruction of military equipment and civilian property and infrastructure. As a consequence of hostilities, entire populations may have to endure displacement, starvation, abuse or disease. Families may be torn apart and dispersed, relatives and friends may go missing and scores of individuals may be detained or interned. In trying to alleviate the suffering of persons

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1139 CIHL, Rule 148.

1140 AP II, Art. 19.

1141 AP II, Art. 6(5); CIHL, Rule 159.

1142 See Rome Statute, Art. 8(2)(c) and (e), and (slightly diverging) CIHL, Rule 156.

1143 ICTY, *The Prosecutor v. Dusko Tadić*, *op. cit.* (note 70), para. 129.

1144 Rome Statute, Art. 8(2)(c)-(f).

1145 CIHL, Rules 152–158.

affected by armed conflicts, IHL addresses these issues in a similar manner for both international and non-international armed conflicts.

Thus, common Article 3(3) encourages parties to a non-international armed conflict “to bring into force, by means of special agreements, all or part of the other provisions” of the Conventions. In addition to strengthening and clarifying the legal regime governing non-international armed conflict, and given that they do not affect the legal status of the contracting parties, special agreements may also provide a pragmatic way to overcome difficulties relating to issues such as the applicability of certain treaties or the legal classification of a conflict. A special agreement bring into application either all or selected IHL provisions governing international armed conflicts. It may establish new legal obligations if it goes beyond the laws already applicable to the context, or may be of a merely declaratory nature, if limited to restating treaty or customary law provisions that are already binding on the parties. In practice, such special agreements are often proposed, prepared and facilitated by the ICRC, and limited to particular provisions of IHL, such as those regulating the establishment of safety zones or the simultaneous release of wounded prisoners. However, broader references to IHL governing international armed conflicts have also been made, such as during the conflict in the former Yugoslavia.

States are often reluctant to enter into special agreements with organized armed groups, in order to avoid supporting the groups’ efforts to gain political legitimacy. In such cases, organized armed groups may also make unilateral declarations, expressing their intent to respect and (ideally) ensure respect for all, or part, of IHL. Even though such declarations may often be politically motivated, they can be a powerful tool for contacting organized armed groups, improving their internal accountability and, ultimately, securing their compliance with IHL.

### To go further (Specific issues arising in non-international armed conflicts)<sup>1146</sup>

- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, [Chapter 12: The Law of Non-International Armed Conflicts](#) and [Chapter 13: Implementation mechanisms, State responsibility, Criminal repression](#), pp. 327–444.
- “[Understanding armed groups and the applicable law](#),” *IRRC*, Vol. 93, No. 882, June 2011.
- “[Engaging armed groups](#),” *IRRC*, Vol. 93, No. 883, September 2011.
- Ezequiel Heffes and Marco D. Kotik, “Special agreements concluded by armed opposition groups: Where is the law?,” *European Journal of International Law: Talk!*, 27 February 2014. Available at: <http://www.ejiltalk.org/author/heffeskotlik/>

### *How Does Law Protect in War?*

- Case No. 61, [UN, Secretary-General’s Reports on the Protection of Civilians in Armed Conflicts \(Part A., paras 19–21; Part B., paras 38–47\)](#)
- Case No. 202, [Geneva Call, Puntland State of Somalia adhering to a total ban on anti-personnel mines](#)
- Case No. 204, [Former Yugoslavia, Special Agreements Between the Parties to the Conflicts](#)

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<sup>1146</sup> All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

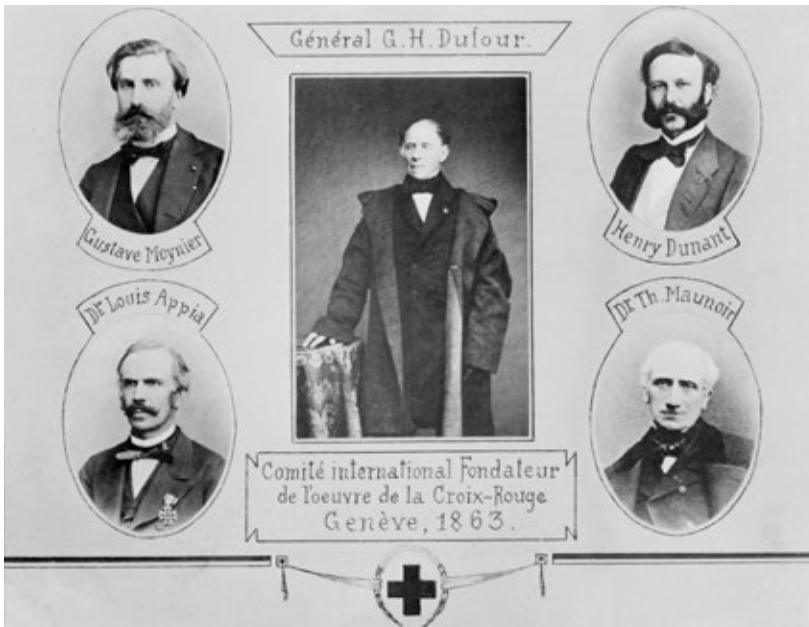






# Chapter 8

## The special role of the ICRC



ICRC

The Committee of Five, which founded the Red Cross in 1863: Louis Appia, Guillaume-Henri Dufour, Henry Dunant, Théodore Maunoir, Gustave Moynier.

## Structure

- I. Purpose and status of the ICRC
- II. Legal basis for ICRC action
- III. The ICRC as the “guardian of IHL”

### In a nutshell

- The ICRC is an impartial, neutral and independent organization, with its own status. Its exclusively humanitarian mission is to protect and assist the victims of armed conflicts and other situations of violence.
- The ICRC also endeavours to prevent suffering by promoting and strengthening IHL and universal humanitarian principles.
- The ICRC directs and coordinates the international activities of the Movement in situations of armed conflict.
- The legal basis for the ICRC’s activities can be found in treaty IHL and the Statutes of the Movement.
- In carrying out its mandate, the ICRC: (1) aims to prevent violations of IHL by maintaining an operational presence, engaging in dialogue and disseminating knowledge of IHL; (2) takes all available measures to end ongoing violations of IHL and to prevent their recurrence; and (3) engages in a continuous process to reaffirm and strengthen IHL.

### To go further<sup>1147</sup>

- *Panorama: The ICRC in action worldwide*, film, ICRC, 2013. Available at: [https://www.youtube.com/watch?v=YBRKo\\_PbqZI](https://www.youtube.com/watch?v=YBRKo_PbqZI)
- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, [Chapter 15: The International Committee of the Red Cross](#), pp. 476–494.
- “[ICRC: 150 Years of Humanitarian Action](#),” *IRRC*, Vol. 94, No. 888, Winter 2012.
- “[Who We Are](#),” webpage, ICRC.

<sup>1147</sup> All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

If there is one institution that stands out with regard to the worldwide promotion and implementation of IHL, it is the ICRC. Inspired by Henry Dunant's account of the battle of Solferino, the ICRC was formally established in 1863 as a private association of Swiss citizens and has, since that date, played a seminal role in the development and implementation of IHL.

## I. PURPOSE AND STATUS OF THE ICRC

### 1. An impartial, neutral and independent humanitarian organization

From the outset, the ICRC has had a dual purpose: to provide relief to the victims of armed conflict, as a neutral and independent humanitarian organization, and to promote efforts to reaffirm and develop the laws and customs of war, with a view to strengthening the protection of persons not, or no longer, directly participating in hostilities. The ICRC initially focused on protecting medical personnel and wounded, sick or shipwrecked combatants in international armed conflicts; but, as the means and methods of warfare evolved, the organization gradually extended its activities to other categories of person, such as prisoners of war, the civilian population and, after World War II, the victims of non-international armed conflicts.

Today, the ICRC describes its mission as follows:

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence, and to provide them with assistance. The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence.<sup>1148</sup>

→ For further information on the origins of the ICRC, see beginning of Chapter 4.

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<sup>1148</sup> ICRC mission statement. Available at: <https://www.icrc.org/en/who-we-are/mandate>

## 2. *Sui generis* status

According to the Statutes of the Movement, the ICRC has “a status of its own” (*sui generis*).<sup>1149</sup> As a private association under Swiss law, the ICRC is not an intergovernmental organization. However, in contrast to non-governmental organizations, the ICRC’s recognized international legal personality enables it to sign headquarters agreements with States to provide its personnel, premises and correspondence with diplomatic protection. Although the ICRC’s headquarters and employees in Geneva remain subject to Swiss law, its headquarters agreement with Switzerland duly takes into account the organization’s international mandate. The *sui generis* character of the ICRC is further illustrated by the fact that, in 1990, it was granted observer status by the UN General Assembly.<sup>1150</sup>

## 3. Component of the International Red Cross and Red Crescent Movement

The ICRC is also the founding body and a key component of the Movement, which comprises all National Societies, the International Federation and the ICRC. The Movement is a humanitarian network that addresses issues of international Red Cross policy while acknowledging the independence of each component. The Movement is unique in that it constitutes a truly universal humanitarian network, operating in line with a single set of seven Fundamental Principles:<sup>1151</sup>

- (1) **Humanity:** The Movement, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours, in its international and national capacity, to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health, and to ensure respect for the human being. It promotes mutual understanding, friendship, cooperation and lasting peace amongst all peoples.
- (2) **Impartiality:** It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.

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1149 [Statutes of the International Red Cross and Red Crescent Movement](#), adopted by the 25th International Conference of the Red Cross at Geneva in October 1986 and amended by the 26th International Conference of the Red Cross and Red Crescent at Geneva in December 1995 and by the 29th International Conference of the Red Cross and Red Crescent at Geneva in June 2006 (Statutes of the Movement), Art. 5(1).

1150 UN General Assembly Resolution 45/6, 16 October 1990.

1151 Preamble, Statutes of the Movement.



M.A. Al-Baba/ICRC

An ICRC delegate at the Central Prison in Gaza, in the occupied Palestinian territory, 2010.

- (3) **Neutrality:** In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.
- (4) **Independence:** The Movement is independent. The National Societies, while auxiliaries in the humanitarian services of their governments and subject to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with the principles of the Movement.
- (5) **Voluntary Service:** It is a voluntary relief movement not prompted in any manner by desire for gain.
- (6) **Unity:** There can be only one Red Cross or one Red Crescent in any one country. It must be open to all. It must carry on its humanitarian work throughout its territory.
- (7) **Universality:** The International Red Cross and Red Crescent Movement, in which all Societies have equal status and share equal responsibilities and duties in helping each other, is worldwide.

The overarching ideals of the Movement are expressed in the mottos *Inter arma caritas* (In war, charity) and *Per humanitatem ad pacem* (With humanity towards peace).

### To go further (Purpose and status of the ICRC)<sup>1152</sup>

- François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, ICRC, Geneva, 2003, 1161 pp.
- David P. Forsythe, *The Humanitarians: The International Committee of the Red Cross*, Cambridge University Press, Cambridge, 2005, 256 pp.
- Daniel Palmieri, “[An institution standing the test of time? A review of 150 years of the history of the International Committee of the Red Cross](#),” *IRRC*, Vol. 94, No. 888, Winter 2012, pp. 1273–1298.
- Jean Pictet, *The Fundamental Principles of the Red Cross: Commentary*, ICRC, Geneva, 1979. Available at: <https://www.icrc.org/eng/resources/documents/misc/fundamental-principles-commentary-010179.htm>

### How Does Law Protect in War?

- Case No. 27, [Agreement between the ICRC and Switzerland](#)

## II. LEGAL BASIS FOR ICRC ACTION

The legal basis for ICRC action is to be found in treaty IHL, State practice and the Statutes of the Movement, all of which constitute binding sources of law. Under the provisions of treaty IHL, belligerent States must grant the ICRC “all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol,”<sup>1153</sup> including: (1) acting as substitute for, or complementing the actions of the Protecting Powers, (2) visiting prisoners of war and other protected persons, (3) operating the Central Tracing Agency, (4) providing humanitarian assistance, (5) fulfilling the ICRC’s special mandate with regard to IHL, and (6) exercising a general right of humanitarian initiative.

### 1. Acting as a substitute for or complementing the actions of Protecting Powers

In cases where the belligerents fail to designate any Protecting Powers, the ICRC may serve as a substitute for Protecting Powers, and perform the humanitarian functions assigned to them by the 1949 Geneva Conventions and Additional Protocol I.<sup>1154</sup> In these treaties, the most important functions are generally simultaneously assigned to both the Protecting Powers and the

<sup>1152</sup> All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

<sup>1153</sup> AP I, Art. 81(1).

<sup>1154</sup> GC I–III, Art. 10; GC IV, Art. 11; AP I, Art. 5(4).



J. Björqvinnson/ICRC

A young patient at the ICRC's orthopaedic centre in Kabul, Afghanistan, 2006.

ICRC. For example, the Protecting Powers and the ICRC have the right to lend their good offices in relation to the institution and recognition of hospital zones and localities<sup>1155</sup> and, most importantly, to visit prisoners of war and other protected persons.<sup>1156</sup> Unlike the Protecting Powers, however, the ICRC may assist not only nationals of a particular State, but any persons protected by the 1949 Geneva Conventions, regardless of their nationality or allegiance.

## 2. Access to prisoners of war and other protected persons

The ICRC must be permitted to visit all places and premises where prisoners of war may be held.<sup>1157</sup> With regard to civilians protected under the provisions of the Fourth Geneva Convention, ICRC delegates must be allowed access not only to places of internment and detention, but to any place where protected persons may be throughout the national territory of a State, and in territories under belligerent occupation.<sup>1158</sup> The purpose of these visits is to objectively evaluate the humanitarian needs of the persons visited, monitor compliance with IHL in connection with their treatment and, if they have been deprived of their liberty,

1155 GC III, Art. 23; GC IV, Art. 14.

1156 See Section II.2.

1157 GC III, Art. 126.

1158 GC IV, Arts 76(6) and 143.

verify that their internment or detention conditions comply with IHL. In order to carry out this task, the ICRC must be able to freely select the places it visits and the visiting delegates must be able to interview, without a witness present, any prisoner of war or other protected person they encounter and to record their identities. The ICRC must also be allowed to repeat its visits, as these are crucial to monitoring the treatment of detainees and other protected persons. While the ICRC must always take into account the security needs of the belligerent parties, the latter may neither prohibit the ICRC's visits to prisoners of war or other protected persons nor restrict their duration or frequency, save in exceptional and temporary situations of imperative military necessity.<sup>1159</sup>

Belligerent States are also obliged to facilitate the right of prisoners of war or other persons protected by the 1949 Geneva Conventions to communicate with ICRC representatives on their own initiative, whether individually or collectively through elected representatives. This right may be exercised for a variety of purposes, such as requesting assistance, reporting violations of IHL, or making any other complaints, suggestions or requests.<sup>1160</sup> In contrast to Protecting Powers, which may receive applications only from nationals of States whose interests they have agreed to represent, the ICRC may receive communications from any persons protected by the 1949 Geneva Conventions. Following contact with prisoners of war or other protected persons, the ICRC may decide to provide humanitarian assistance in response to identified needs or, in the case of IHL violations, take appropriate steps to prevent further violations.

### 3. Central Tracing Agency

The work of the Central Tracing Agency is closely tied to the ICRC's visits to prisoners of war and other protected persons. The Agency's mandate is laid out in the 1949 Geneva Conventions and it is managed by the ICRC. The Agency's primary purpose is to trace missing persons, unaccompanied children and anyone in the power of an adverse party, to inform their country of origin or allegiance of their whereabouts, and to restore family links ruptured by war.<sup>1161</sup> Any information that might help to identify and reconnect persons in particular need of protection is collected, stored in a centralized database and forwarded by the Agency. The Agency arranges the exchange of family correspondence when the usual means of communication have been disrupted, the transfer and repatriation of individuals, and the reunification of separated families. In fulfilling these tasks, the Agency may also issue certain documents, such as temporary ICRC travel documents for persons without identity papers, and certificates of captivity, hospitalization or death for former detainees,

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<sup>1159</sup> GC III, Art. 126; GC IV, Arts. 76(6) and 143.

<sup>1160</sup> GC III, Arts 78 and 81(4); GC IV, Arts 30 and 104(3).

<sup>1161</sup> GC III, Art. 123; GC IV, Arts 25, 136 and 140; AP I, Arts 33(3) and 78(3).





J. Torgovnik/Getty Images/ICRC

Ubangui river, Congo, 2011. An ICRC team on its way to Bolombe to distribute manioc seed, farm implements and fishing equipment under a programme benefiting about 100,000 people in the Likouala district.

prisoners of war or other rightful claimants. The Agency usually works in close cooperation with the National Societies; and the belligerent parties must facilitate these activities to the greatest possible extent.

#### 4. Humanitarian assistance

Belligerent and non-belligerent States have a basic duty to allow and facilitate the delivery of impartial humanitarian relief in areas within and outside their territorial control.<sup>1162</sup> Although the 1949 Geneva Conventions do not give the ICRC an exclusive mandate to provide humanitarian relief, its treaty-based right of access to victims of armed conflict certainly gives the organization a unique position in this respect. The Conventions explicitly mention, for example, that the ICRC may provide humanitarian assistance to prisoners of war and other protected persons,<sup>1163</sup> that the organization may be entrusted with the transport of relief shipments,<sup>1164</sup> and that its representatives may supervise the distribution of aid.<sup>1165</sup> Should military necessity or other essential security considerations require restrictions to be placed on the number or frequency of such relief shipments, due notice

<sup>1162</sup> GC IV, Art. 23; AP I, Art. 70(2); AP II, Art. 18(2); see also Chapter 6.IV.

<sup>1163</sup> GC III, Art. 125; GC IV, Arts 59 and 142.

<sup>1164</sup> GC III, Art. 75; GC IV, Art. 111.

<sup>1165</sup> GC III, Art. 73(3); GC IV, Arts 61 and 109(3).

must be given to the ICRC,<sup>1166</sup> and its “special position in this field shall be recognized and respected at all times.”<sup>1167</sup> Thus, ideally, the ICRC should either be exempt from restrictions placed on the activities of relief societies or, at the very least, be the last organization to which they are applied.<sup>1168</sup>

### 5. Legal basis for the ICRC’s special mandate with regard to IHL

The universally recognized role of the ICRC as the “guardian of IHL” is only briefly mentioned in the 1949 Geneva Conventions and Additional Protocol I. Of course, to a certain extent, this role may be regarded as an implicit part of the ICRC’s operational mandate to assist protected persons. Given that the ICRC shares many of those tasks with other organizations or Protecting Powers, it is probably more accurate to say that, historically, instead of being primarily defined in treaty IHL, the legal basis for the organization’s special mandate with regard to IHL has developed through longstanding and uniform State practice.

For example, the ICRC’s work to prepare and facilitate the drafting and adoption of the Geneva Conventions of 1864, 1906, 1929 and 1949, and their three Additional Protocols of 1977 and 2005, had no explicit legal basis in treaty IHL. The 1977 Additional Protocols merely provide that Switzerland – as the depositary – should consult not only with the other States Parties, but also with the ICRC, before convening a conference to consider proposed amendments to the text.<sup>1169</sup> Also, other than describing the ICRC as a neutral and impartial humanitarian body, treaty IHL provides no definition of the ICRC’s *modus operandi* with regard to the reaffirmation and development of IHL. Instead, the organization’s *modus operandi* has gradually developed over 150 years, drawing from its own practice and that of belligerent States.

Today, of course, the ICRC’s “guardianship” of IHL is expressly recognized in the Statutes of the Movement, an instrument adopted not only by the components of the Movement, but also by all States party to the 1949 Geneva Conventions, thus providing it with quasi-universal legitimacy.<sup>1170</sup> Most notably, the Statutes provide the ICRC with the specific mandate:

1166 GC IV, Art. 108(2).

1167 GC III, Art. 125(3); GC IV, Art. 142(3).

1168 J.S. Pictet (ed.), *Commentary on the Third Geneva Convention, op. cit.* (note 492), p. 601.

1169 AP I, Art. 97; AP II, Art. 24.

1170 The Statutes of the Movement were adopted at the 25th International Conference of the Red Cross and Red Crescent in 1986 (146 participating States). They have subsequently been revised, and thus *de facto* endorsed, by the States party to the Geneva Conventions attending the International Conferences in 1995 (176 States Parties) and 2006 (185 States Parties), respectively. On that basis, it can be affirmed that the Statutes of the Movement have been almost universally endorsed by States.

- to promote awareness and disseminate knowledge of IHL, and to prepare any development thereof;
- to undertake the tasks incumbent upon it under the 1949 Geneva Conventions, to work for the faithful application of IHL applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law;
- to provide protection and assistance to military and civilian victims of armed conflicts;
- to operate the Central Tracing Agency;
- to cooperate with National Societies on matters such as their preparation for armed conflict, fostering respect for, strengthening and promoting the ratification of the 1949 Geneva Conventions, and the dissemination of IHL.<sup>1171</sup>

The ICRC also endeavours to ensure that its existing rights, privileges and working procedures are acknowledged in each context through headquarters agreements and memoranda of understanding.

→ On the ICRC's role and *modus operandi* as the “guardian of IHL,” see Chapter 8.III below.

## 6. General right of humanitarian initiative

Apart from the humanitarian functions specifically assigned to the ICRC to protect and assist victims of conflict, the 1949 Geneva Conventions and Additional Protocol I also provide the organization with a specific legal basis to “carry out any other humanitarian activities in favour of these victims, subject to the consent of the Parties to the conflict concerned,”<sup>1172</sup> and confirm that the provisions of these instruments may not be interpreted to constitute an obstacle to the protection and relief activities of the ICRC.<sup>1173</sup> In non-international armed conflicts, common Article 3 provides that an “impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.”<sup>1174</sup> This means that the Geneva Conventions and their Additional Protocols leave it up to the ICRC to decide what humanitarian activities it deems most appropriate in a particular situation. While States Parties are not obliged to accept any proposals or offers of service made by the ICRC on its own initiative, they may not regard them as

1171 Statutes of the Movement, Art. 5.

1172 AP I, Art. 81(1).

1173 GC I–III, Art. 9; GC IV, Art. 10.

1174 GC I–IV, Art. 3(2); see also AP II, Art. 18.

an illegitimate intervention, and must at least receive and consider them in good faith.<sup>1175</sup> During armed conflicts, now and in the past, the ICRC's recognized right of humanitarian initiative has always been one of the legal cornerstones of its operational action and its activities to reaffirm and strengthen IHL.<sup>1176</sup>

The Statutes of the Movement also provide that the ICRC “may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution.”<sup>1177</sup> Thus, the ICRC's right of humanitarian initiative extends beyond situations of armed conflict to internal disturbances and tensions, and any other situations that warrant humanitarian action. In fact, even where IHL does not apply, the ICRC may offer its services to governments without that offer amounting to interference in the internal affairs of the State in question.

#### To go further (Legal basis for ICRC action)<sup>1178</sup>

- “[The future of humanitarian action](#),” *IRRC*, Vol. 93, No. 884, December 2011.
- “The ICRC's Mandate and Mission,” webpage, ICRC. Available at: <https://www.icrc.org/eng/who-we-are/mandate/overview-icrc-mandate-mission.htm>

#### *How Does Law Protect in War?*

- Document No. 31, [Statutes of the International Red Cross and Red Crescent Movement](#)
- Document No. 32, [The Seville Agreement](#)
- Document No. 34, [ICRC, Tracing Service](#)
- Document No. 39, [ICRC, Protection of War Victims](#)
- Document No. 40, [ICRC, Protection Policy](#)
- Case No. 41, [ICRC, Assistance Policy](#)

### III. THE ICRC AS THE “GUARDIAN OF IHL”

In promoting respect for IHL, in line with its broad mandate and role under treaty IHL and the Statutes of the Movement, the ICRC essentially follows a three-pronged approach. Firstly, the ICRC's preventive strategy aims to

<sup>1175</sup> Vienna Convention on the Law of Treaties, Art. 31.

<sup>1176</sup> See Section III.4.

<sup>1177</sup> Statutes of the Movement, Art. 5(3).

<sup>1178</sup> All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

avert IHL violations through its operational presence in the field, its regular representations to remind belligerent parties of their obligations under IHL, and by disseminating knowledge of IHL as widely as possible. Secondly, if the ICRC becomes aware of IHL violations, it takes all available measures to end them and prevent such violations from recurring. Thirdly, the ICRC is engaged in ongoing efforts to reaffirm and strengthen IHL, in order to ensure that this crucial body of law continues to be adequately interpreted and adapted in light of the evolving nature of warfare.

### 1. Memoranda to belligerent parties (*rappels du droit*)

At the outset of any armed conflict, or when the outbreak of hostilities appears imminent, the ICRC reminds each party of its obligations under IHL. In the case of States, the ICRC generally sends formal memoranda to the governments concerned (*rappels du droit*), while certain organized armed groups may be better reached through a press release or direct meetings. The memoranda contain a reminder of the applicable rules and principles of IHL governing the conduct of hostilities and the protection of persons in the hands of an enemy. In addition to issuing formal memoranda, the ICRC endeavours to engage in a bilateral dialogue with each of the belligerent parties, in order to secure access to protected persons in their power, as well as, the facilities, authorizations and guarantees necessary for its operations.

For example, on 23 September 1980, one day after Iraq attacked the Islamic Republic of Iran, the ICRC reminded the belligerents of their obligations under the Geneva Conventions; and on 26 September, the organization was authorized to send delegates to Iraq. Similarly, as soon as NATO Secretary-General Javier Solana authorized allied military action against the Federal Republic of Yugoslavia in 1999, the ICRC sent a diplomatic note to NATO and its member States, as well as to the Yugoslav authorities, reminding them of their obligations under IHL. If necessary, such memoranda may be re-invoked during the course of an armed conflict, or extended to States entering the conflict at a later date. For example, on 2 August 1990 – the same day that Iraqi troops invaded Kuwait – the ICRC reminded the belligerents of their obligation to comply with the Geneva Conventions and, on 23 August, formally requested the Iraqi authorities to allow it to carry out its mandate in Iraq and occupied Kuwait. In December 1990, when military intervention by the international coalition seemed imminent, the ICRC sent a “Memorandum on the Applicability of International Humanitarian Law” to all States party to the 1949 Geneva Conventions.<sup>1179</sup> Memoranda sub-

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1179 ICRC, “Memorandum on the Applicability of IHL,” 14 December 1990. Reprinted in: *IRRC*, Vol. 280, 1991, p. 24.

mitted to belligerents during the course of an armed conflict or belligerent occupation do not need to be as comprehensive as those submitted initially, and may focus on particular issues that give the ICRC cause for concern. For example, since the Arab-Israeli War of 1967, the ICRC has regularly reminded Israel of its obligations under IHL towards the population of the occupied Palestinian territory, adapting the focus of its memoranda to take into account observations made by its delegates in the field.

## 2. *Modus operandi* in response to violations of IHL

As soon as the ICRC becomes aware that violations of IHL have been committed, or that such violations are ongoing or imminent, it takes appropriate steps to prevent or end such acts, and to ensure that they are not repeated in the future. Depending on the nature and extent of the violations, steps are taken at various hierarchical levels and using a range of methods. The ICRC's *modus operandi* in this regard has been outlined in a set of institutional guidelines entitled "Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence."<sup>1180</sup>

### (a) Principal mode of action: Bilateral and confidential representations

The ICRC's preferred working method involves bilateral and confidential representations to belligerent parties, if possible "from the bottom up." As a first step, the ICRC approaches the belligerent party concerned in confidence, if possible at the hierarchical level directly responsible for the violation. The primary aim is to ensure that those responsible for IHL violations understand their international obligations, and to convince them to take the measures necessary to prevent such violations in the future. In order for its bilateral representations to succeed, the ICRC must operate with absolute integrity and credibility. This means that the organization cannot take sides in a conflict, or discriminate against any group of victims. It must be completely neutral and impartial. Another key aspect of the ICRC's *modus operandi* is the confidential nature of its bilateral dialogue and observations. The fact that the ICRC maintains such a dialogue, visits places of detention or undertakes other activities to assist victims of armed conflict is not confidential information. However, the content of the ICRC's bilateral dialogue with belligerent parties, and the observations made by its delegates in the course of their work, are highly confidential. Put simply, the ICRC says publicly *what it does*, but not *what it sees*.

<sup>1180</sup> ICRC, "[Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence](#)," *IRRC*, Vol. 87, No. 858, June 2005, pp. 393–400.

Although confidentiality is not one of the seven Fundamental Principles governing the ICRC's actions,<sup>1181</sup> the importance of this approach to the ICRC's humanitarian mission cannot be overstated. Belligerent parties will rarely provide the ICRC with unhindered access to security detainees or other vulnerable persons, or allow its delegates to collect extremely sensitive information, unless they can be certain that the organization will not publicly share the information it collects, particularly with regard to IHL violations. Moreover, even the smallest suspicion that ICRC delegates collecting such information might personally testify against the perpetrators in subsequent civil or criminal proceedings could seriously jeopardize the safety of ICRC staff. Therefore, in 1999, the ICTY decided that ICRC staff could refuse to give evidence in criminal proceedings. This privilege of immunity has since been extended to the ICRC as an organization and formally incorporated in the Rules of Procedure of the International Criminal Court.<sup>1182</sup> More often than not, confidentiality serves the interests of both the belligerent party and the victims, particularly if individual cases are mentioned by name in reports or other documents. The ICRC therefore asks belligerent parties not to share the content of their bilateral dialogue including, in particular, the ICRC's reports on observations made during detention visits or other activities to assist protected persons. The ICRC stresses in each report that its contents are strictly confidential, that they are intended only for the authorities to whom the report is addressed, and that neither the report as a whole nor any part thereof may be divulged to a third party or the public. Should selected parts of such a report be leaked by the detaining authority to which it is submitted, for instance to influence public opinion on its compliance with IHL, the ICRC reserves the right to publish the full contents of the leaked report, in order to prevent inaccurate or incomplete interpretations of its observations and recommendations.

### **(b) Subsidiary modes of action**

The confidentiality of the ICRC's bilateral dialogue is a policy choice that is neither obligatory nor unconditional. It presupposes a commitment made in good faith by the authorities to give due consideration to the ICRC's concerns, observations and recommendations with regard to ensuring respect for IHL. If the authorities concerned manifestly refuse to cooperate with the ICRC, the organization will generally raise its bilateral and confidential dialogue to the next level within the military or administrative structure of the State or armed group in question. Should the ICRC's bilateral and confidential representations on all relevant hierarchical levels fail to prevent further

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1181 See Section I.3.

1182 ICTY, *Prosecutor v. Simic et al.*, Trial Chamber Decision, 17 July 1999; Rules of Procedure of the International Criminal Court, Art. 73(4).

violations of IHL, and if there is no prospect of improving the situation, the ICRC may decide to resort to a number of subsidiary measures.

***Humanitarian mobilization***

As a first step, the ICRC may decide to “extend the circle of confidentiality” and to share all or some of its concerns (again on the condition of mutual confidentiality) with governments of third countries, international or regional organizations, or individuals in a position to influence the actions of the belligerent party in question. Such confidential humanitarian mobilization is directed primarily at States, and is based on their international obligation to exert pressure on the belligerent party “to ensure respect” for IHL in all circumstances, and to avoid encouraging, supporting or otherwise facilitating IHL violations.<sup>1183</sup> While the ICRC may engage in this kind of humanitarian mobilization, it makes no recommendations regarding measures to be taken by States, organizations or individuals.

***Public declaration on the quality of the confidential, bilateral dialogue***

The ICRC may also decide to publicly express its concerns regarding the quality of its confidential, bilateral dialogue with the belligerent party, or the quality of the response to its recommendations on a specific humanitarian problem, albeit without actually disclosing the exact content of the dialogue, or the recommendations or response in question. The purpose of publicly expressing dissatisfaction with the dialogue or cooperation maintained with a belligerent party is not to “name and shame,” but to prompt a better response to the ICRC’s representations and recommendations, and prevent the organization’s silence being wrongly interpreted as evidence that the humanitarian situation is satisfactory.

***Public condemnation***

Finally, as a last resort in the face of repeated serious violations of IHL, the ICRC reserves the right to publicly condemn specific violations of IHL and to call for them to cease immediately. In order for the ICRC to issue a public condemnation, the following four conditions must be met in each case:

- (1) the violations are major and repeated, or likely to be repeated;
- (2) there is reliable and verifiable evidence of such violations, or they have been witnessed by ICRC delegates themselves;
- (3) bilateral confidential representations and, when attempted, humanitarian mobilization efforts have failed to put an end to the violations;

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<sup>1183</sup> See Chapter 7, Sections III.1. and IV.2.



- (4) last but not least, no public condemnation may be made unless it is in the interest of the protected persons or populations concerned.

In fact, the ICRC has rarely issued public condemnations. When it has, the statements have mainly related to situations where regular and repeated representations have failed to yield the necessary results, where IHL violations have clearly been part of a deliberate policy, or where the ICRC has been completely unable to obtain access to the authorities concerned. In each case, the ICRC must be convinced that public pressure constitutes the only means of achieving respect for IHL. When considering the interests of the persons or populations affected by an IHL violation, the ICRC must take into account both their short-term interests, in terms of humanitarian protection and relief, and their long-term interests, in terms of the ICRC's continued access to war victims not only in the current situation, but also during other armed conflicts in the future. Public condemnation of IHL violations always involves the weighing up of extremely complex considerations: the interests of the ICRC, those of the belligerents and, above all, the interests of current and future victims of armed conflict.<sup>1184</sup>

### (c) ICRC attitude toward third-party initiatives

#### *Relations with judicial, quasi-judicial or investigating authorities*

As mentioned previously, the ICRC does not provide testimony or confidential documents in connection with investigations or legal proceedings relating to specific violations. However, this does not prevent the organization from maintaining regular contact with judicial, quasi-judicial or investigating authorities on general issues relating to the implementation, application or interpretation of IHL.

#### *Participation in inquiries and recording of facts*

The ICRC does not perform the role of a commission of inquiry and, as a general rule, neither the organization nor its staff will participate in inquiry procedures. Instead, the ICRC may encourage belligerent parties to appeal to the International Humanitarian Fact-Finding Commission.<sup>1185</sup> At the request of all the belligerent parties concerned, the ICRC may also offer its good offices to help to establish an impartial commission of inquiry offering the necessary procedural guarantees. However, the ICRC will offer its limited services only on the understanding that this will in no way undermine its usual activities, or its reputation for impartiality and neutrality.

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1184 For an example of public condemnation, see "Myanmar: ICRC denounces major and repeated violations of international humanitarian law," ICRC, 29 July 2007. Available at: <https://www.icrc.org/eng/resources/documents/news-release/2009-and-earlier/myanmar-news-290607.htm>

1185 On the International Humanitarian Fact-Finding Commission, see Chapter 7.VII.4.

Should the ICRC be asked to record the factual consequences of an IHL violation, it will do so only for its own purposes, and only if it is satisfied that the organization's presence will not be abused for political purposes.

### ***Receiving and communicating complaints***

The Statutes of the Movement stipulate that the ICRC's mandate includes "taking cognizance" of any complaints based on alleged IHL violations. While the ICRC is keen to receive all available information on alleged IHL violations, it accepts no obligations with regard to following up those allegations, unless such obligations result from its own humanitarian policies and priorities. Thus, the ICRC may take individual allegations into account in its own activities, but will not communicate allegations of violations to the incriminated party unless they have been recorded by its own delegates, or are based on reliable and verifiable evidence and, above all, only if such a move is in the interest of the victims. In exceptional circumstances, where all other means of communication have broken down, the ICRC may agree to communicate allegations of IHL violations in its capacity as a neutral intermediary between belligerent parties or their National Societies. While the ICRC generally does not make public the complaints it receives, it may publicly confirm receipt of a complaint, if it concerns events that are public knowledge.<sup>1186</sup>

### **3. Prevention work**

Preventive action is the fourth central component of the ICRC's work, in addition to its protection, assistance and cooperation activities in response to violations of IHL and humanitarian needs arising in operational practice. Prevention work "entails taking action to prevent suffering by influencing those who can determine – directly or indirectly – the fate of those affected (by armed conflict and other situations of violence) and generally implies a medium- or long-term perspective."<sup>1187</sup> The ICRC's prevention approach aims to understand the reasons for certain types of behaviour, and how to influence them.

As part of its prevention work, the ICRC maintains a regular dialogue with both State and non-State actors, and reminds them of their respective legal obligations. Moreover, it organizes training courses in IHL for both State representatives and members of non-State entities, humanitarian professionals and academics, and regularly publishes texts on various topics relating to humanitarian law and action. Finally, the ICRC – and particularly its Advisory Service on International Humanitarian Law – also offers its

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1186 ICRC, "Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence," *op.cit.* (note 1180), p. 399.

1187 ICRC, [Prevention Policy](#), April 2010, p. 5.

services to States to help them incorporate their IHL obligations in national legislation, institutions and practice.

#### 4. Reaffirmation and strengthening of IHL

As part of its role as the “guardian of IHL,” the ICRC contributes to strengthening IHL by initiating, organizing or participating in consultations on the possible adoption of new rules; and preparing, or contributing to, draft texts for submission to diplomatic conferences. Most notably, the ICRC made a decisive contribution to the preparation and drafting of the 1949 Geneva Conventions and their Additional Protocols of 1977 and 2005. More recently, the results of an internal study on the adequacy of IHL led the ICRC to conclude that the law could be strengthened in four specific areas, namely: (1) the protection of persons deprived of their liberty in non-international armed conflicts, (2) the protection of internally displaced persons, (3) the protection of the environment and (4) implementation mechanisms, including reparation for victims. Since September 2010, the ICRC has discussed the study with a number of States, most of whom have expressed broad support for its conclusions. However, States have expressed a preference for prioritizing the protection of detainees in non-international armed conflicts and improving the implementation of IHL.

- For more information, see Textbox 8: “Procedural safeguards for internment /administrative detention” (Chapter 5.IV.2.b.)
- See also Textbox 9: “Swiss/ICRC initiative on strengthening the implementation of IHL” (Chapter 7.III.4.b.).

While working on the formal development of new IHL instruments, the ICRC may also engage in activities and consultations to clarify existing IHL provisions. As part of this role, the ICRC has conducted or contributed to a broad range of consultations, conferences, projects and processes of varied scope and duration. A select few are mentioned below to illustrate the practical importance of these efforts.

- ***Strengthening the protection of victims of armed conflicts:*** as mentioned above, the ICRC has conducted a large-scale consultation process on this issue. The work has focused on two areas: detention in non-international armed conflicts and strengthening compliance with IHL.
- ***Commentaries on the 1949 Geneva Conventions and their Additional Protocols:*** The ICRC’s *Commentaries* on the 1949 Geneva Conventions and their Additional Protocols are an

excellent example of institutional guidance on the interpretation of these instruments. As each *Commentary* was drafted within a few years of the adoption of the relevant treaty, the ICRC is in the process of updating the *Commentaries* to ensure that they respond more adequately to interpretive questions arising in contemporary armed conflicts.

- ***Study on customary IHL***: In 2005, after nearly ten years of research and consultation, the ICRC published a study on customary IHL, identifying 161 rules that strengthen protection for victims of armed conflict<sup>1188</sup> (see Textbox 1, Chapter 1.II.2.).
- ***Montreux Document (2008)***: In 2008, 17 countries signed the Montreux Document, which aims to ensure that private military and security companies working in armed conflicts respect IHL and human rights law (see Textbox 3, Chapter 1.IV.4.3.).<sup>1189</sup>
- ***Interpretive guidance on direct participation in hostilities (2009)***: In 2009, after six years of informal consultations with a group of more than 50 governmental, military, humanitarian, academic and non-governmental experts, the ICRC published its interpretive guidance on the notion of “direct participation in hostilities.” This notion has grown in significance in the context of current targeting operations, even though there is no precise definition in IHL (see Textbox 5, Chapter 3.I.4.c.).<sup>1190</sup>

In fulfilling the broad mandate bestowed upon it by the international community, the ICRC has developed a wide range of preventive and reactive modes of action to ensure respect for IHL, and made a decisive contribution to its ongoing reaffirmation and development. Despite the paramount practical importance of the ICRC, however, and its worldwide recognition as the “guardian” of IHL, we must never forget that it is the international community of States that is the creator and “guarantor” of this body of law and that therefore bears ultimate responsibility for the faithful application and enforcement of its rules.<sup>1191</sup>

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1188 J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, *op. cit.* (note 23).

1189 Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict, Montreux, 17 September 2008.

1190 N. Melzer, *Interpretive Guidance*, *op. cit.* (note 130).

1191 GC I-IV, Art. 1.

### To go further (The ICRC as the “guardian of IHL”)<sup>1192</sup>

- Jean-Marie Henckaerts, “[Bringing the Commentaries on the Geneva Conventions and their Additional Protocols into the twenty-first century](#),” *IRRC*, Vol. 94, No. 888, Winter 2012, pp. 1551–1555.
- Gabor Rona, “[The ICRC’s privilege not to testify: Confidentiality in action](#),” *IRRC*, Vol. 84, No. 845, March 2002, p. 207.
- [Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law](#), ICRC, Geneva, 2009, 85 pp.
- ICRC, [Prevention Policy](#), Geneva, 2010, 25 pp.
- *Montreux +5 Conference: Chair’s Conclusions*, ICRC and Federal Department of Foreign Affairs, Geneva, 13 December 2013. Available at: <https://www.icrc.org/eng/assets/files/2014/montreux-plus-5-conclusions-12-2013.pdf>
- “Customary International Humanitarian Law Database,” webpage, ICRC. Available at: <https://www.icrc.org/customary-ihl/eng/docs/home>
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- “Confidentiality: Key to the ICRC’s work but not unconditional,” Interview with Dominik Stillhart, Director of Operations at the ICRC, ICRC, Geneva, 2010. Available at: <https://www.icrc.org/eng/resources/documents/interview/confidentiality-interview-010608.htm>

### *How Does Law Protect in War?*

- Document No. 50, [ICRC, Sixtieth Anniversary of the Geneva Conventions](#)
- Case No. 170, [ICRC, Iran/Iraq Memoranda](#)
- Case No. 214, [ICTY/ICC, Confidentiality and Testimony of ICRC Personnel](#)

<sup>1192</sup> All ICRC documents available at: [www.icrc.org](http://www.icrc.org)

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# References

## ICRC LEARNING TOOLS AND PUBLICATIONS

The following tools and publications allow readers to learn about IHL in “four steps,” each of them adapted to the specific interests, level of knowledge and learning needs of various target groups.

### 1. E-learning course: *The Basic Rules and Principles of IHL*

An introduction to the basics of IHL for non-specialists (eight modules), the course is currently available in French, Spanish and English on the ICRC's “Online Learning Centre” webpage, along with other thematic e-modules.

- E-learning course: <https://www.icrc.org/en/online-training-centre>

### 2. IHL textbook: *International Humanitarian Law: A Comprehensive Introduction*

This is a comprehensive introductory textbook on IHL written in concise and clear language. Its value and usefulness lie in its distinctive combination of “In a nutshell” sections providing key IHL rules at the beginning of each chapter, “To go further” sections offering a variety of thematic references and “Textboxes” providing details on contemporary humanitarian issues and IHL projects. It is intended for students, teachers and scholars interested in IHL, but may also prove useful to lawyers and military and humanitarian personnel looking for a comprehensive overview of contemporary IHL, from the ICRC's perspective.

- IHL textbook: <https://shop.icrc.org/>

### 3. IHL casebook: *How Does Law Protect in War?*

This selection of nearly 300 case studies provides university professors, legal and humanitarian personnel, and students with the most up-to-date and comprehensive selection of documents on IHL now available. It presents fundamental, contemporary legal issues relating to armed conflict and contains a series of outlines for professors setting up introductory or advanced IHL courses. It is available in English and French, and as a regularly updated and fully navigable online database.

- IHL casebook (PDF and paper): <https://www.icrc.org/eng/resources/documents/publication/p0739.htm>
- IHL casebook (online database): <https://www.icrc.org/casebook/>

#### **4. IHL journal: *The International Review of the Red Cross***

Established in 1869, the *International Review of the Red Cross* is a quarterly journal published by the ICRC and Cambridge University Press. It is a forum for debate on IHL and on humanitarian action and policy as they relate to armed conflicts and other situations of violence. The target groups are governments, international governmental and non-governmental organizations, universities, the media and everyone else who is interested in humanitarian issues. Because of the broad range of perspectives it offers, in several languages, the *Review* is particularly helpful for teachers and researchers.

- IHL journal: <https://www.icrc.org/eng/resources/international-review/index.jsp>

## ICRC DATABASES

The following databases provide official legal sources for established lawyers, military and humanitarian personnel, and academics wishing to supplement their work, research and studies with references to the relevant provisions of IHL treaties, customary rules and national legislation.

### **Online database: *Treaties, States Parties and Commentaries***

The database of treaties, States Parties and commentaries contains about 100 IHL instruments, dating from 1856 to the present. The treaties, documents and updated commentaries to the Geneva Conventions (2016 onward) are grouped in current and historical sections and arranged by topic and by date. Outdated texts, such as the Geneva Convention of 1864, are also included, in view of their historical value. Readers can view each text in full (PDF in the right-hand column) or by article.

- Treaties, States Parties and Commentaries online database:  
<http://www.icrc.org/ihl>

### **Online database: *Customary IHL***

This database is the updated version of the ICRC study on customary international humanitarian law originally published by Cambridge University Press. Also available in Arabic, Chinese, French, Russian and Spanish, the first part presents an analysis of existing rules of customary IHL. The second part contains the practice underpinning the rules analysed in Part 1 and is updated on a regular basis by the ICRC, in cooperation with the British Red Cross. The most recent update added national practice (highlighted in green) in a group of five countries.

- Customary IHL online database:  
<https://www.icrc.org/customary-ihl/eng/docs/home>

### **Online database: *IHL national implementation***

The ICRC set up this database to share the information it has collected on national implementing measures. The content of the database – legislation and case-law – is drawn from information collected by the ICRC Advisory Service on International Humanitarian Law and sent to it by States. The database may not be exhaustive, but it provides a comprehensive overview of IHL implementing measures taken by all States.

- IHL national implementation database:  
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The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence.



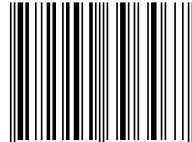
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*International Humanitarian Law: A Comprehensive Introduction* is an introductory textbook that aims to promote and strengthen knowledge of IHL among academics, weapon-bearers, humanitarian and media professionals. It presents contemporary issues related to IHL in an accessible, practical and comprehensive manner, and in line with the ICRC's reading of the law. Its distinctive format and style make it the ideal everyday companion for anyone approaching IHL for the first time and curious about conflict-related matters, as well as military and humanitarian personnel seeking useful guidance on a vast array of topics.



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